IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-682

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,
Respondents,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Petitioners,

NORTHWEST OPPORTUNITY CENTER AND ELUTERIA D. MALDONADO,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JACK M. SIEGEL,
39 South LaSalle Street,
Chicago, Illinois 60603,
312-263-2968,
Attorney for Petitioners, Village of Arlington Heights, et al.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Village of Arlington Heights, an Illinois municipal corporation, petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, decided July 7, 1977.

OPINIONS BELOW.

The Seventh Circuit's decision of July 7, 1977, remanding this cause to the District Court is reprinted in full as Appendix A to this petition.

The opinion of this Court, decided on January 11, 1977, and reported at ..... U. S. ....., 50 L. Ed. 2d 450, 97 S. Ct. ....., is reprinted in full as Appendix B to this petition.

A prior opinion of the Seventh Circuit in this cause, decided on June 10, 1975, and reported at 517 F. 2d 409, which was subsequently reversed and remanded by this Court, is reprinted in full as Appendix C to this petition.

The original opinion of the District Court, reported at 373 F. Supp. 208, is reprinted in full as Appendix D to this petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 7, 1977. The order en banc denying the petition for rehearing was entered on August 25, 1977, with four active members of the Court having voted to deny a rehearing en banc and four active members of the Court having voted to grant a rehearing en banc. Because a majority of the active members of the Court did not vote to grant a rehearing en banc, the petition for rehearing was denied. A copy of the order of August 25, 1977 is reprinted as Appendix E to this petition.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1254. This petition for writ of certiorari has been filed in accordance with 28 U. S. C. § 2101.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the refusal to amend an admittedly valid non-discriminatory zoning ordinance violate the Fair Housing Act of 1968, merely because the ordinance prevents the construction of a multiple-family housing project for low and moderate income families, which might include minority tenants?

2. Does the defendant, municipality, have the burden of identifying alternative sites for low-cost housing in the event a

valid zoning ordinance precludes development on the site sought by the plaintiffs?

3. Does the language of the Fair Housing Act impose an affirmative duty on the municipality to make land available for low-cost housing within its corporate limits, absent any showing of discriminatory intent in its zoning ordinance and comprehensive plan, and thus zone for racial purposes?

4. Did the plaintiffs properly allege or prove any violation of the Fair Housing Act?

5. Did the Court of Appeals follow the directions of this Court in remanding the cause to the District Court for further proceedings and the taking of additional evidence?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

This case involves the Fourteenth Amendment of the Constitution of the United States, and the provisions of 42 U. S. C. §§ 3601, *et seq.*, the Fair Housing Act of 1968. The relevant provisions are set forth in Appendix F to this petition.

STATEMENT OF THE CASE.

This cause was heard and determined in part by this Court in the case of *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, ... U. S. ....., 50 L. Ed. 2d 450, 97 S. Ct. ....., decided January 11, 1977. The Court in its opinion found that there was no violation of the Fourteenth Amendment by the refusal of the petitioner, Village of Arlington Heights, to rezone land for the purpose of constructing a multiple-family development for low and moderate income housing. The Court remanded the cause for further consideration of the respondents' statutory claim of the violation of the Fair Housing Act.

The Court of Appeals for the Seventh Circuit on remand, instead of determining the statutory claim as directed by this Court, remanded the cause back to the District Court with directions that the District Court take evidence on the question of whether alternative subsidization would be available under Section 8 of the United States Housing Act, whether the project would be racially integrated so that the tenants of the project would be substantially non-white, and whether other sites which were properly zoned and suitable for low-cost housing under federal standards were available. The burden of producing alternate sites was placed upon the petitioner, Village.

The factual situation of this case has been described at length in the previous opinion of this Court, the two opinions of the Seventh Circuit, and the opinion of the trial court, and need not be repeated here.

After the original trial, the District Court held that the Village's action in refusing to rezone the subject property to permit a low and moderate income multiple-family project, did not violate the equal protection clause of the Fourteenth Amendment. The Court found that the zoning decision was not motivated by racial discrimination or opposition to poor people, but rather by a legitimate desire to protect property values and the integrity of the Village's zoning plan. (App. D6) It concluded that the denial would not have a racially discriminatory effect. (App. D4) The District Court further took note of the Fair Housing Act complaint, holding that no specific section of the Fair Housing Act was referred to in the pleadings, and none seemed applicable to the facts of the case. (App. D2)

The Court of Appeals in a divided opinoin reversed the District Court. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. It further held that a disparity in racial impact alone did not call for strict scrutiny of the municipality's decision that prevented the construction of low-cost housing. (App. C7) The Court of

Appeals however ruled that the denial of the plaintiff's Lincoln Green proposal had racially discriminatory effects, which could be tolerated only if it served compelling interests. The Court determined that the defenses offered by the Village did not meet that standard. The Court of Appeals therefore concluded that the denial violated the equal protection clause of the Fourteenth Amendment. (App. C11) The Court of Appeals in its opinion noted that the complaint alleged a violation of the Fair Housing Act, but based its opinion on its conclusion that the Fourteenth Amendment had been violated.

This Court reversed, holding that there had been a failure to prove racially discriminatory intent, which would be necessary to prove a violation of the Fourteenth Amendment. This Court remanded, with directions to the Court of Appeals to consider the respondents' complaint that the refusal to rezone violated the Fair Housing Act, 42 U. S. C. §§ 3601, *et seq.*

On remand, the Court of Appeals did not make a final determination of whether the Village's refusal to rezone violated the Fair Housing Act. Its opinion noted that the trial court had apparently declined to decide the merits of the plaintiffs' claim under the Fair Housing Act *because the plaintiffs did not pursue it* or view it as different from their constitutional claim. The Court specifically explained its original decision by remarking that *it had not decided the statutory question because, although the plaintiffs' complaint mentioned the Fair Housing Act, they did not pursue the statutory claim either with the District Court or with the Court of Appeals.* (App. A5)

The Court of Appeals then went on to rely upon the language of Title VII of the Civil Rights Act, relating to equality of employment opportunities, to hold that there can be a violation of Title VIII, the Fair Housing Act, by showing a discriminatory effect without a showing of discriminatory intent.

The Court of Appeals then purported to set forth four factors to be considered in determining whether the circumstances, under which conduct that produces a discriminatory

impact but which was taken without discriminatory intent, will violate Section 3604(a) of the Fair Housing Act. The Court concludes that, by analysis of the four factors, this is a close case. (App. A18) It concludes that, if there is no land other than the plaintiffs' property within Arlington Heights, which is both properly zoned and suitable for federally subsidized low-cost housing, the Village's refusal to rezone constituted a violation of Section 3604(a). It remanded the case to the District Court for the purpose of determining whether a violation of the Fair Housing Act occurred as a result of the Village's refusal to rezone.

The Court placed upon the plaintiffs the burden of showing that federal financing for the project was still available, and that the project if built would be substantially non-white. Assuming that these two propositions could be proved, the Court then put the burden on the Village of identifying a parcel of land which was both properly zoned and suitable for low-cost housing under federal standards. The Court then held that, if the Village failed to satisfy this burden, the District Court should conclude that the refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within the Village and should grant the plaintiffs the relief they sought.

Chief Justice Fairchild in concurring noted that he did not subscribe to all the principles and analytical steps described in the opinion. He thought moreover that the burden of showing an alternate site should be allocated to the plaintiffs rather than the Village.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The writ should be granted in this case because the decision of the Court of Appeals is clearly in conflict with the original decision of this Court in this case. It is in conflict with applicable decisions of this Court and other courts of appeal throughout the country in determining both the substance and the burdens

imposed under the Fair Housing Act of 1968. The conclusion of the Court of Appeals is that the refusal to amend an admittedly valid non-discriminatory zoning ordinance, which was enacted without discriminatory intent, violates the Fair Housing Act.

The thrust of the opinion is to reverse the burden in cases brought under the Fair Housing Act and require a municipality to identify sites which meet not only zoning, but financial availability for low-cost housing, or otherwise face the invalidation of proper zoning requirements. The opinion of the Court of Appeals is that a refusal to rezone property, which is clearly suitable for single-family use in the midst of a single-family area, constitutes a violation of the Fair Housing Act if a low income, federally funded housing project, which will have a substantial minority tenancy, is sought for the site and the Village can offer no alternative site. The municipality must either violate its own zoning and planning principles, or present an alternate site. The Court of Appeals' opinion thus holds that zoning principles must give way to racial consideration, notwithstanding the fact that the zoning itself was proper by all conventional zoning standards and there was no discriminatory intent in its enactment. The net effect is that every municipality in the country must not only zone land for low income housing, but must rezone otherwise unavoidable land if it cannot actually demonstrate that properly zoned land is available at prices within federal financial limitations.

The opinion moreover flies in the face of this Court's opinions in *Washington* v. *Davis*, 426 U. S. 229, 248, and in this case, and holds, in effect, that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if it in practice benefits or burdens one race more than another. It also violates the Court's holding in *Hills* v. *Gautreaux*, 425 U. S. 284, that low income housing projects are subject to local zoning and land use laws.

Moreover, the Court of Appeals' opinion explicitly recognizes that the plaintiffs failed to pursue their statutory claim at the trial

and appellate levels. Fundamental principles of judicial administration dictate that, when, as here, the plaintiffs apparently waived their statutory claim by not pursuing it, it is totally inappropriate for the plaintiffs now to be given another opportunity to make a case, which they apparently abandoned at the original trial. The unorthodox approach, which the Court of Appeals initially adopted, is now compounded by its refusal to make a determination based upon the trial court record, as directed by this Court. It has so far departed from the accepted and usual course of judicial proceeding by this opinion as to call for an exercise of this Court's power of supervision.

Finally, we suggest that the Court of Appeals' last opinion not only does violence to the words and intent of the Fair Housing Act, but would have the effect of requiring a municipality to disregard its comprehensive plan and its admittedly valid zoning ordinance, and to take affirmative steps to zone for racial integration. To construe the Fair Housing Act in such a manner is clearly contrary to the language and intent of the statute and is of great national consequence which demands the scrutiny of this Court.

I.

THE REFUSAL TO AMEND AN ADMITTEDLY VALID ZONING ORDINANCE DID NOT VIOLATE THE FAIR HOUSING ACT MERELY BECAUSE THE ORDINANCE PREVENTED THE CONSTRUCTION OF A LOW AND MODERATE INCOME PROJECT, WHICH MIGHT INCLUDE MINORITY TENANTS.

This Court in its opinion of January 11, 1977 remanded this cause to the Seventh Circuit for the specific purpose of considering whether the record in the trial court showed a violation of Sections 3604 or 3617 of the Fair Housing Act. As we shall indicate below, we believe that the original opinion of the trial court, as well as the original opinion of the Seventh Circuit, indicates that the statutory claims of the plaintiffs were implicitly rejected.

The most recent opinion of the Seventh Circuit in fact quite explicitly holds that the plaintiffs did not pursue their statutory claim, either in the District Court or with the Court of Appeals. (App. .....) The Seventh Circuit on remand from this Court should have held therefore either that the plaintiffs waived their right to raise this claim, or that the statutory question was implicitly decided adversely to the plaintiffs before the constitutional question could be raised.

The Seventh Circuit however has now attempted to permit the relitigation of the statutory claim under novel and unprecedented guidelines which would determine whether or not Section 3604(a) was in fact violated by refusal to rezone.

It is quite apparent however that, under no circumstances, could the factual evidence in this record give rise to a violation of the Fair Housing Act. We have appended to this brief Sections 3601 through 3619 of Title 42 of the United States Code. Those are the provisions of the Fair Housing Act apparently referred to in the initial complaint. The provisions of Sections 3604 and 3617 were specifically indicated by this Court as the subject of possible inquiry.

Section 3604 deals specifically with discrimination in the sale or rental of housing. Among the transactions subject to its provisions are the refusal to sell or rent a dwelling unit to any person because of race, color, religion or national origin, to discriminate against any persons in the terms, conditions or privileges of sale or rental because of race, color, religion or national origin, to publish any notice or statement with respect to sale or rental that indicates any preference or discrimination based on race, color, religion or national origin, to represent to any person because of race, color, religion or national origin that any dwelling is not available for inspection, sale or rental, or to profit or induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of persons of a particular race, color, religion or national origin.

Section 3617 makes it unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of or on account of his having aided or encouraged any other person in the exercise or enjoyment of rights protected under Sections 3603, 3604, 3605 or 3606.

Section 3603 sets forth the application of the provisions against discrimination in the sale or rental of housing and describes the type of dwelling covered. Section 3605 makes it unlawful for banks, building and loan associations, insurance companies or other corporations whose business consists of making loans to deny a loan or other financial assistance to persons because of race, color, religion or national origin. Section 3606 pertains to discrimination in the provision of brokerage services.

An examination of these statutes on their face clearly indicates that they may be invoked only in case of discrimination based upon race, religion or national origin. They apply to discrimination in the sale or rental of housing, the financing of housing, and the provision of brokerage services. The Village of Arlington Heights is not involved in the sale or rental of housing or financing of housing or the provision of brokerage services. It has not in any way interferred, coerced or intimidated anyone with respect to the sale or rental or financing of housing or the provision of brokerage services. The clear language of the statute demonstrates that the Village has committed no violation.

The Court of Appeals in its opinion restricts the issue to whether or not there is a violation of Section 3604(a). That section on its face makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." If the section in question was in fact violated, it must be shown that the Village's refusal to rezone made unavailable or denied a dwelling to a person because of his race, color, religion or national origin.

This Court determined that there was one individual plaintiff, respondent Ransom, who had demonstrated standing to assert his rights in this cause. 50 L. Ed. 2d 450, 463. This Court said: "The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory." 50 L. Ed. 2d 450, 464.

The testimony in the record shows that Ransom resided at 1423 Dewey in Evanston. His household consisted of himself, his mother and his son. He had been employed at Honeywell in Arlington Heights for 10 years. He indicated that he lived in a five room house in Evanston. His mother was also employed and made $130 a week. His salary was $166 a week. He admitted he never sought any housing in Arlington Heights. He lives 20 miles from Honeywell, which is a 45 minute ride. Ransom's interest in living in Arlington Heights was limited to the statement that he would probably move to Lincoln Green because it was closer to his work. The record shows no effort on his part to reside in Arlington Heights or any refusal of access to any specific housing accommodations.

The record totally fails to support Ransom's allegation that he seeks and would qualify for the housing MHDC wanted to build. There was no showing that he qualifies for 236 housing. The Court of Appeals in its opinion totally ignores Ransom's status as the only plaintiff with standing. There is no mention of Ransom or any individual plaintiff in the Court's opinion.

It has now finally and authoritatively been determined by this Court that the Village was not guilty of any racial discrimination. That holding is completely consistent with the determination of the trial court and the Court of Appeals that, in refusing to amend an admittedly valid Zoning Ordinance, the Village was not motivated by any racially discriminatory intentions. We respectfully suggest that, since any violation of the statute must clearly rest on making unavailable or denying a dwelling unit to a person because of his race, color, religion or national origin,

this finding of absence of racial discrimination must terminate the inquiry.

An examination not only of the statute but of the case law demonstrates that the factual situation present cannot constitute a violation of the Fair Housing Act. The question involves the refusal of the Village to amend a Zoning Ordinance, which is clearly valid according to basic land use considerations. As the Court of Appeals and the trial court had found, this Court concluded that there was no racial motivation present in refusing to amend this long standing zoning restriction in the light of the factual situation present. This Court found that the evidence did not warrant overturning the concurrent findings of both courts below. It found that MHDC simply failed to carry its burden of proving that discriminatory purpose was a motivating factor in the Village's decision. 50 L. Ed. 2d 450, 467.

This Court specifically rejected the Seventh Circuit's reliance upon the necessity of showing a compelling state interest or compelling justification for refusing to rezone. It agreed that *James* v. *Valtierra*, 402 U. S. 137 (1971), 28 L. Ed. 2d 678, 91 S. Ct. 1331, does not call for strict scrutiny of a municipality's decision that prevents the construction of low cost housing. It went further in Footnote 5 at 50 L. Ed. 2d 450, 461, to hold that there was no reason to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing, relying for this proposition on *Lindsey* v. *Normet*, 405 U. S. 56 (1972), and *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973).

This Court thus rejected the cornerstone of the Seventh Circuit's initial conclusion, *i.e.*, that the refusal to rezone must meet the compelling interest test. Having thus established that the compelling interest test need not be applied in a case of constitutional challenge, no such compelling interest test can be applied in determining a statutory violation.

This Court in its earlier decision of *Washington* v. *Davis*, 426 U. S. 229 (1976), 48 L. Ed. 2d 597, specifically held that, with

respect to statutory claims, the compelling justification test will not be applied unless the statute specifically requires that test. *Washington* v. *Davis* involved a challenge based upon the Equal Protection Clause and Title VII of the Civil Rights Act of 1964. Directly in point is the Court's holding at 48 L. Ed. 2d 597 at page 612, where it rejected a rule that a statute designed to serve neutral ends would be invalid absent compelling justification if in practice it burdened the poor and the Black more than affluent Whites. The Court said:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. ***However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.***" (Emphasis added.)

There is of course nothing in the Fair Housing Statute which by legislative prescription requires the application of the compelling justification test even if there is disproportionate impact on the poor and the black. The compelling justification test cannot be applied in testing the validity of an admittedly non-discriminatory Zoning Ordinance against the Fourteenth Amendment or the Fair Housing Act. The holding of *Washington* v. *Davis* when applied to the Fair Housing Act is totally consistent with previous decisions of lower courts and of this Court when faced with zoning decisions.

This Court had initially rejected the compelling state interest test when applied to zoning in the case of *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974). The compelling interest test was also specifically rejected in *Construction Industry Association of*

Sonoma County v. *City of Petaluma*, No. 74-2100, decided by the Court of Appeals for the Ninth Circuit, wherein the Court rejected the concept that an allegedly exclusionary zoning ordinance was a violation of the Fourteenth Amendment. At page 11 of the slip opinion, the Court said:

> "In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose of the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City, 373 F. Supp. at 581. The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation."

Here, this Court in effect found that the Arlington Heights Zoning Ordinance does serve such a legitimate interest.

In the case of *Ybarra* v. *City of Town of Los Altos*, 503 F. 2d 250 (9th Cir. 1974), the Court of Appeals refused to apply the compelling interest test in a case challenging a large lot zoning ordinance on the grounds that it excluded Mexican Americans. The basis for the challenge, as here, was the Equal Protection Clause *and a statutory claim under the Civil Rights Act*. The trial court had found that the ordinance prevented poor people from living in Los Altos and that if Mexican Americans did not live there, it was because of poverty. The Court at page 253 said: "We agree that discrimination against the poor does not become

discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background."

In the case of *Acevedo* v. *Nassau County*, 500 F. 2d 1078 (2d Cir. 1974), the Court was considering the liability of Nassau County, New York, for abandoning plans for constructing low-income family housing. At page 1080, the Court noted:

> "Appellees have no constitutional or statutory duty to provide low income housing. There is no 'constitutional guarantee of access to dwellings of a particular quality.' Lindsay v. Normet, 405 U.S. 56, 74 (1972)."

The Court went on to say at page 1082:

> *"The Fair Housing Act does not impose any duty upon a government body to construct or to 'plan for, approve and promote' any housing."* (Emphasis added.)

In the case of *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F. 2d 1087 (1974), the Sixth Circuit Court of Appeals held that the failure of Cleveland suburbs to enter into a cooperation agreement for the construction of federally assisted housing *did not violate federal civil rights laws* or the United States Constitution. The Court relied heavily on *Palmer* v. *Thompson*, 403 U. S. 217. At page 1093, it said:

> "In the present case the failure of the suburbs to provide low-rent housing affected alike both low-income blacks and whites. There may have been a greater impact on the blacks, but that, under Palmer, is not sufficient to establish a constitutional violation.
>
> In Lindsey v. Normet, 405 U. S. 56 (1972), the Court held that no one has a constitutional right to adequate housing. Since a person has no right to public housing in his own city, it follows that he has no such right in a municipality in which he does not reside.

The Fair Housing Act does not prohibit discrimination based on poverty. In *Kennedy Park Homes Association* v. *City of Lackawanna*, 318 F. Supp. 669, the Court at page 694 said:

> "The Fair Housing Act of 1968 covers discriminatory conduct in fair housing situations by both public and pri-

vate alleged wrongdoers. However, the nature of the discrimination proscribed under the Fair Housing Act is limited in that it does not include discrimination based on poverty."

The fact that zoning makes land more expensive and prices it out of the market for single-family homes does not render the zoning ordinances invalid. *Confederation de La Raza Unida* v. *City of Morgan Hill,* 324 F. Supp. 895. At page 897 in that case, the Court commented on the zoning ordinance and said:

> "It does not, on its face, by its expressed purposes, by its administration, or otherwise, discriminate against anyone or racial, ethnic or income grounds . . . *It does not, therefore, conflict with any of the purposes or provisions* of *Title VIII of the Civil Rights Act of 1968* . . ." (Emphasis added.)

The Court went on:

> "Reduced to its bald essentials plaintiffs' claim is that the Federal policies on low-income housing require that poor people be allowed to live wherever they like. The fact that legitimate zoning policies, based upon valid esthetic and other considerations adopted by local authorities may make certain land expensive is, plaintiffs seem to argue unlawful. The Court finds no such manifestation of intent in the National Housing Act or otherwise."

In the case of *Skillken & Co.* v. *City of Toledo,* 528 F. 2d 867, decided by the United States Court of Appeals for the Sixth Circuit on December 10, 1975, the Court was considering a suit brought under the *Civil Rights Act* to force the City of Toledo to rezone an area in a single-family neighborhood to permit the construction of low income housing. The Court of Appeals reversed the District Court which had ordered the rezoning. At page 20 of the slip opinion, the Court said:

> "The District Court erred in applying the compelling interest test, rather than a rational basis test, in determining whether Toledo's legislation was invalid. The ruling conflicted with our decision *Mahaley* v. *Cuyahoga Metropolitan Housing Authority, supra.*

Lindsey v. *Normet,* 405 U.S. 56 (1972) holds that no one has a constitutional right to adequate public housing. We rely also on *Citizens Comm. for Faraday Wood* v. *Lindsay,* 362 F.Supp. 651 (S.D.N.Y. 1973), which has since been affirmed by the Second Circuit Court of Appeals, 507 F.2d 1065 (2d Cir. 1974) . . .

In *Palmer* v. *Thompson,* 403 U.S. 217 (1971), the Court held that a neutral policy which had a greater impact on a minority group was not invalid.

The zoning laws in the present case are not inherently suspect. To apply the compelling interest test would virtually invalidate all forms of state legislation where people are affected differently.

The compelling interest rule was rejected in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *James* v. *Valtierra,* 402 U.S. 137, 142 (1971); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Citizens Comm. for Faraday Wood* v. *Lindsay, supra, Ranjel* v. *City of Lansing,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1969), *rehearing denied,* 397 U.S. 1059 (1970).

> It is significant that no attack has been made here on Toledo's comprehensive zoning ordinance. It was neutral legislation enacted long before the controversy in the present case arose."

The Sixth Circuit on remand of *Skillken,* in light of this opinion by this Court in the instant case, specifically adhered to its previous opinion on June 21, 1977.

Even the Seventh Circuit has recognized in the context of a Fair Housing Act complaint that the failure to act, when based on other than racial grounds, is not a violation of the statute. In the case of *Pughsley* v. *3750 Lake Shore Drive Cooperative Building,* 463 F. 2d 1055 (7th Cir. 1972), it said at page 1056: "We recognize, as defendants agree, that they have a right to refuse approval on any honest basis unrelated to the race of the prospective purchaser or his associates."

In the case of *Madison* v. *Jeffers*, 494 F. 2d 114 (4th Cir. 1974), in an action under the Fair Housing Act, the Court said in a comparable situation at page 116:

> "The district court concluded that there was no proof of Jeffers' failure to sell because of the Madisons' race, color, religion or national origin, and found that Jeffers in fact refused to sell because of legitimate tax reasons. The record clearly shows that Jeffers consistently stated he would not sell for tax reasons, both before and after he discovered that the prospective purchasers were black. There was little or no evidence to indicate racial bias, other than the Madisons' belief that this was the reason. The record also supports the finding of the district court that the Madisons never indicated to Jeffers or his real estate agent a willingness to purchase the property during the time it was available for sale. The civil rights statutes as interpreted make clear that one who sells or leases real estate '[has] a right to refuse approval on any honest basis unrelated to the race of the prospective purchaser. . . .' Pughsley v. 3750 Lake Shore Drive Cooperative Building, 463 F.2d 1055, 1056 (7th Cir. 1972). See also Fred v. Kokinokos, 347 F.Supp. 942, 944 (E.D.N.Y. 1972); Bush v. Kaim, 297 F.Supp. 151, 162 (N.D. Ohio 1969). Since there is substantial evidence supporting the district court's findings, we are unable to say that they are clearly erroneous."

In the instant case, of course, this Court has recognized not only that there was no racial motivation in refusing to rezone the subject property, but that the refusal was based upon other valid considerations. This finding is in conformance with that of the trial court who heard the evidence and concluded that the Village was motivated by "a legitimate desire to protect property values and the integrity of the Village's zoning plan." 373 F. Supp. 208, 211.

The findings of the trial court, which in all respects were adhered to by the Seventh Circuit in its initial opinion, were supported by the evidence and should not be disturbed. *Northcross* v. *Board of Education of Memphis*, 397 U. S. 232 (1970), 25 L. Ed. 2d 246; *United States* v. *79.95 Acres of Land*, 459

F. 2d 185, 187 (10th Cir. 1972); *Davis* v. *Cities Service Oil Company*, 420 F. 2d 1278, 1279 (10th Cir. 1970). The finding of the trial court that there was no violation of the Fair Housing Act should not be set aside unless clearly erroneous. *Marr* v. *Rife*, 503 F. 2d 735, 740 (6th Cir. 1974); Fed. R. Civ. P., Rule 52.

It is clear, based upon the holding of this Court in *Washington* v. *Davis*, that the burden in a case based on an alleged violation of the Fair Housing Act rests with the plaintiff because there is no legislative prescription which requires compelling justification. In the case of *Marr* v. *Rife*, 503 F. 2d 735 (6th Cir. 1974), an action was brought under the Fair Housing Act and, more specifically, under Section 3612. It had been argued by the appellants that, based upon cases dealing with employment discrimination, the burden of proof shifted to the defendants after a prima facie case had been made. The Court at page 739 said:

> "In opposing appellants' argument, appellees rely in part on the case of Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973), involving the Fair Housing Act. The Court there said:
>
> > 'We are urged to hold that the defendant should have the burden of establishing his defense through clear and convincing evidence. We are not so persuaded. It is true, of course, that prejudice is difficult to prove except circumstantially. But it is equally difficult to disprove and we see no compelling reason to vary from traditional rules applicable generally to civil cases.' 477 F.2d at 910 n. 2.
>
> We are of the view that none of the above cases cited by appellants are of controlling importance in deciding the burden of proof issue. We do believe, however, that a plaintiff in a Section 3612 suit must show a violation by a preponderance of the evidence.
>
> The Fair Housing Act provides two means of enforcing its provisions. Under Section 3610(a), a person 'aggrieved' may file a complaint with the Secretary of Housing and Urban Development, and investigation and resolution of the complaint's charges is accomplished by the Secretary. If the

Secretary is unable to obtain voluntary compliance with a certain period, a civil suit may be commenced by the person aggrieved. (Section 3610(d)). However, it is provided under Section 3610(e) that '[i]n any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.'

The alternate route for obtaining redress for a violation of the Act is pursuant to Section 3612, which provides the right to file suit in a federal or state court without awaiting action by the Secretary. Although Section 3612 fails to indicate the burden of proof to be applied, it would be anomalous for a different burden of proof to apply under that Section than is applied under the Section 3610 procedure. By adopting appellants' suggested burden of proof, we would virtually eliminate any reason for seeking voluntary enforcement under Section 3610. This we decline to do.

We hold that the District Court was correct in holding that the appellants were required to carry the burden of proof by a preponderance of the evidence. It should be noted that the amicus brief of the United States does not join in appellants' contention as to the burden of proof."

This holding is totally consistent of course with *Washington* v. *Davis,* where the Court points out that in employment cases, unlike fair housing cases, the statute does impose a compelling justification test.

In the opinion of July 7, 1977, the Seventh Circuit relies substantially upon the case of *Washington* v. *Davis,* 426 U. S. 229, and would attempt to utilize that decision for imposing the compelling interest test on municipalities accused of fair housing violations. There is of course no basis in the statute for differentiating between municipalities and private parties, where the Seventh Circuit has recognized that the burden remains on the plaintiff.

Moreover, the Seventh Circuit ignores the fact that *Washington* v. *Davis* was based upon the particular language in Title VII. It would analogize the language in 703(h) with the language of 3604(a) of Title VIII. Yet, this Court in *Washington* v. *Davis* very specifically and pointedly limited the holding of

Griggs v. *Duke Power Co.,* 401 U. S. 424, to Title VII cases. In language totally controlling on the case at bar, the Court refused to press upon the defendant the burden of justifying a statute to serve neutral ends. 426 U. S. 229, 248.

The Seventh Circuit's reliance on *Griggs* in distinguishing *Washington* v. *Davis* ignores the fact that in the *Griggs* case this Court specifically adopted the EEOC guidelines, which shifted the burden of demonstrating that a test was job related if a disproportionate exclusion of blacks resulted from a challenged examination. There are no such guidelines involved here to support the construction of 3604(a), which the Seventh Circuit now adopts.

The Seventh Circuit describes what it designates as an expansive view of 3604(a). In fact, it was reading language into the statute which was never there and which places a burden on the defendants of changing the Zoning Ordinance or identifying alternate sites, notwithstanding the fact that no racially discriminatory intent existed and the ordinance is in all respects valid. Such an interpretation requires two zoning ordinances; one for the poor and the black, and another for the rest of the community.

The record fails to show any deprivation of housing opportunities for minorities. Contrary to the holding of the Seventh Circuit, its conclusion that a violation of the Fair Housing Act can be established by showing discriminatory effect, without showing discriminatory intent, has never been applied to a municipality in the exercise of its zoning power. Moreover, the Court of Appeals recognizes that, even if a racially discriminatory effect was shown, a violation of 3604(a) is not necessarily established. However, the Court goes on to establish four tests to determine whether or not a violation has in effect been established. These four tests are not found in the statute, nor are they supported by any line of authority applying the tests to Fair Housing Act situations. We respectfully suggest that what the Court is doing is extending the statute, without the kind of clear

legislative prescription that this Court insisted upon in *Washington* v. *Davis*.

Even applying the four tests to the record in this case, it is clear that the Village has not committed a violation. The Court concedes that with respect to at least two of the four factors, the Village would be vindicated. The Court notes, as it must, that there was little or no evidence of discriminatory intent and that the Village was acting within the scope of its authority, wherein it has been afforded wide discretion.

With respect to the first test as to how strong the plaintiff's showing of discriminatory effect was, we suggest that there has actually been no showing of discriminatory effect. The Court admits that it is unclear whether the Village's refusal to rezone would necessarily perpetuate segregated housing in the Village. It is important to recognize that the 190 units involved here would in all likelihood produce a population of something less than 500 persons. Even assuming the unlikely, that 40% of the occupancy would be black, that would only produce 200 blacks, all residing in a small "ghettoized" community. In fact, the Village had by 1976 a black population of 200 without any special zoning consideration, purely by the operations of the market. It can hardly be said that there has been a strong showing of discriminatory effect by virtue of the refusal to rezone the property in question.

The fourth criteria is whether the plaintiff seeks to compel the defendants to affirmatively provide housing for members of minority groups or merely to restrain the defendants from interfering with individual property owners who wish to provide such housing. Here, the Court ignores the fact that the Village is not in the business of providing housing under any circumstances for whites or blacks. Under no circumstances could the Village affirmatively provide housing for minority groups. The Village's function is to enact zoning ordinances which are rational and related to the police power. This Court has already said that the zoning ordinance is valid. The Court of Appeals' opinion does impose an affirmative duty upon the Village. That duty is either

to rezone the subject property, or in the alternative to identify an appropriate site for low and moderate income housing. What the Court is insisting upon is the setting aside of an admittedly valid ordinance solely for the purpose of providing housing for almost as many blacks as are already in Arlington Heights.

The Village is not interfering with the plaintiff's attempt to build integrated housing. The Village is simply saying that this is the wrong place for a multiple-family development, even if it is to provide low and moderate income housing. We suggest that factor four does not favor the plaintiff.

Analysis of the four factors does not reveal that this is a close case. All four factors favor the Village, even if there was some legal basis for imposing these tests in a new trial, which this Court did not order and in fact did not anticipate. The Court admits: "Whether the Village's refusal to rezone has a strong discriminatory impact because it effectively assures that Arlington Heights will remain a segregated community is unclear from the record." Having so found, the Court of Appeals ought to have refrained from imposing a new and unprecedented burden and simply recognize that the plaintiff failed to show any violation of the Fair Housing Act, rather than giving the plaintiff a second chance under ground rules which are unsupported by the cases or the statute.

No remand should take place because, pursuant to the directions of this Court, the Court of Appeals failed to find any violation of the Fair Housing Act on the record as it exists. The trial court found no violation, and the Court of Appeals now even suggests that the plaintiff never pursued its claim of a fair housing violation.

Most noteworthy is the Court of Appeals' total disregard of the opinion of this Court in the case of *Hills* v. *Gautreaux*, 425 U. S. 284, 47 L. Ed. 2d 792. That case was brought under both the Fifth Amendment and the Civil Rights Act. The Court held that in the case of a constitutional violation involving housing

discrimination, there could be a remedy beyond municipal boundaries, but at page 305 the Court said:

> "Use of the § 8 program to expand low-income housing opportunities outside areas of minority concentration would not have a coercive effect on suburban municipalities. For under the program, the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to *require that zoning and other land use restrictions be adhered to by builders.*" (Emphasis added.)

The Court went on to say at page 306:

> "The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws."

The Court of Appeals' opinion however specifically orders the Village of Arlington Heights, and thus other municipalities in the Chicago metropolitan area, to ignore their existing valid zoning ordinances. It displaces the rights and powers according to the Village under its existing land use laws.

In *Dayton Board of Education* v. *Brinkman*, 45 L. W. 4910, decided on June 27, 1977. In that decision, the Court clearly defined the tasks of a court of appeals. At page 4913, it said:

> "On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law."

It went on to say:

> "The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16. See *Rizzo* v. *Goode*, 423 U. S. 362, 377."

We suggest that what is being attempted by the Seventh Circuit's opinion is to restructure the operation of the Village government in its zoning function. This clearly is not the function of this or any other federal court, absent a constitutional violation.

This Court has recognized that the refusal to rezone was based upon legitimate legislative considerations and was not racially motivated. No discrimination based on race, which is proscribed by the Fair Housing Act, took place. The mere fact that 40% of those persons who might have been eligible to live in Lincoln Green may have been black does not render the Village's refusal to depart from its rational and valid zoning plan a violation of the Fair Housing Act. To hold otherwise would, as this Court noted in *Washington* v. *Davis*, raise serious questions about, and perhaps invalidate, a whole range of taxing, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the black than to the white population of this country.

Moreover, to hold that a valid zoning ordinance violates the Fair Housing Act under the circumstances present here would render meaningless the pronouncement in *Gautreaux* that local governments retain the right to require that zoning and other land use restrictions be adhered to by builders.

To remand this case under the guidelines and directions laid down by the Seventh Circuit would be wholly contrary to the repeated opinions of this Court and the various courts of appeal, including, in fact, the Seventh Circuit. The result would be the destruction of basic zoning and planning law. It would promote

zoning by race, which is totally contrary not only to the letter and spirit of the Fourteenth Amendment, but to the Fair Housing Act as well.

II.

THE VILLAGE SHOULD NOT HAVE THE BURDEN OF IDENTIFYING ALTERNATE SITES FOR LOW COST HOUSING.

The opinion of the Seventh Circuit imposes upon the Village the requirement of identifying land which is suitable for federally subsidized low cost housing, notwithstanding the fact that the Village does not own land and is not in the business of providing land for developers. The opinion specifically puts the burden on the Village of finding a site which is available at a price which meets federal guidelines and the respondent can afford and is properly zoned.

The record is of course clear that there are many sites properly zoned, several of which are vacant. That however does not mean that the Village can or should have available a site at a price which makes low income housing feasible under federal guidelines.

This Court has specifically rejected the compelling justification test in its original opinion in this case. In *Washington* v. *Davis*, 426 U. S. 229, the Court warned against the extension of the compelling justification test unless it was specifically required by the statute. No such requirement appears in the Fair Housing Act, nor are there comprehensive regulations such as those relied upon in the *Griggs* case to shift the burden here.

The Court offers no absolute authority for its shifting of the burden to identify land which is suitable for federally subsidized low cost housing, to the Village. The law is quite clear that the burden in fair housing cases is on the plaintiff. See, for example, *Marr* v. *Rife*, 503 F. 2d 735 (6th Cir. 1974); and *Hamilton* v. *Miller*, 477 F. 2d 908 (10th Cir. 1973). In the *Miller* case, the Court said:

> "We are urged to hold that the defendant should have the burden of establishing his defense through clear and convincing evidence. We are not so persuaded. It is true, of course, that prejudice is difficult to prove except circumstantially. But it is equally difficult to disprove and we see no compelling reason to vary from traditional rules applicable generally to civil cases."

In the *Marr* case, the Court said:

> "We hold that the District Court was correct in holding that the appellants were required to carry the burden of proof by a preponderance of the evidence. It should be noted that the amicus brief of the United States does not join in appellants' contention as to the burden of proof."

Even Chief Judge Fairchild, while concurring in the opinion of the Seventh Circuit, said in commenting on the burden in the consideration of plaintiffs' statutory claim: "It seems to be, however, that traditional principles apply and burden should be allocated to plaintiffs."

What the Circuit Court of Appeals' opinion does in fact is to reinstate the doctrine of compelling justification, which this Court has specifically disavowed in the numerous decisions. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 36 L. Ed. 2d 16; *Lindsey* v. *Normet*, 405 U. S. 56; *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, ... U. S. ....., 50 L. Ed. 2d 450. The courts of appeal have repeatedly asserted, as indicated above, that cases tried under the Fair Housing Act have the normal burden of proof allocated to the plaintiffs. The Seventh Circuit, without authority or without justification, now would reverse that burden, at least in part. The result of shifting the burden is, as indicated above, to require every municipality to affirmatively demonstrate that there is land properly zoned and available at prices which will meet federal low cost housing guidelines, or else abandon their proper zoning ordinances. There is nothing in the Fair Housing Act that can dictate such a result.

Every court which has considered this case has agreed that there was no showing of discriminatory intent on the part of the Village of Arlington Heights in its refusal to rezone. The Fair Housing Act does not in its terms, or as construed by any other court, impose a duty on the municipality to make land available for low cost housing within its corporate limits, absent any showing of discriminatory action on the part of the municipality.

III.

THERE WAS NO ALLEGATION OR PROOF OF ANY VIOLATION OF THE FAIR HOUSING ACT, AND THE COURT OF APPEALS FOUND, IN FACT, THAT THE PLAINTIFFS HAD WAIVED THIS ALLEGATION ON THE TRIAL OF THE CAUSE.

On January 11, 1977, this Court remanded the instant cause to the Seventh Circuit for the purpose of determining whether or not there was a violation of the Fair Housing Act when the Village refused to rezone the property in question. The purpose for the remand was to permit the Court of Appeals to examine the record and determine whether that record indicated any violation of the statute in question. 50 L. Ed. 2d 450, 468.

Instead of examining that record, the Court of Appeals, contrary to the direction of this Court, remanded the cause to the trial court for the purpose of taking additional evidence within guidelines laid down by the Court of Appeals. We respectfully suggest that that was not the purpose of the remand and that, by the recognition of the necessity of taking additional evidence, the Court of Appeals implicitly conceded that the record below did not support any finding of a violation of the Fair Housing Act.

The Court of Appeals in its opinion specifically stated that it did not originally decide the statutory question because the plaintiffs did not pursue the statutory claim, either with the District Court or with the Court of Appeals on its original consideration. The Court of Appeals further noted that the trial court declined

to hear the merits of the plaintiffs' claim under the Fair Housing Act, apparently, because the plaintiffs did not pursue it or did not view it different from their constitutional claim.

The trial court specifically found that no section of the Fair Housing Act was applicable to the facts in this cause. *Metropolitan Housing Development Corporation* v. *Village of Arlington Heights*, 373 F. Supp. 208, 209 (1974). But, if the Court of Appeals is correct in its present holding that the plaintiffs did not pursue their statutory claim either in the trial court or before the Court of Appeals originally, it must be concluded that that claim was waived. That should terminate the proceeding in favor of the defendants.

It is totally incongruous for this Court to have decided that there was no violation of the Fourteenth Amendment and the Court of Appeals to find that the plaintiffs did not pursue their statutory claim in either the District Court or Circuit Courts, and yet have the cause remanded for trial of a claim, which was in fact not pressed and thereby waived. The Court of Appeals does not suggest, as it cannot, any authority for giving the plaintiffs another opportunity to present a claim, which the Court said it failed to present in either the District or Circuit Courts.

The proper action of the Court of Appeals, on finding that the statutory claim had not been pursued either with the District Court or with the Court of Appeals, would have been simply to affirm the trial court because its findings on the only other issue, the Fourteenth Amendment claim, had been affirmed by the Supreme Court.

The Court of Appeals in its original opinion of June 10, 1975 noted the fact that the plaintiffs contended that the action of the Village in refusing to rezone violated the Fair Housing Act. Nevertheless, the Court went on to determine the constitutional question without making any finding with respect to the Fair Housing Act. It is elementary of course that the constitutional question will not be passed upon if the statutory grounds would have resolved the controversy. ***Arkansas Louisiana Gas Company***

v. *Department of Public Utilities*, 304 U. S. 61, 64 (1938); *Arkansas Fuel Oil Company* v. *State of Louisiana*, 304 U. S. 197, 202 (1938); *Alma Motor Company* v. *Timken-Detroit Axle Company*, 329 U. S. 129, 136 (1946).

As we have demonstrated above, there was in fact no violation of the Fair Housing Act. The Court of Appeals must have implicitly so held or it would not have gone on to a consideration of the Fourteenth Amendment claim. The Court of Appeals in its most recent opinion now tells us that the statutory claim was not pursued in the trial court or before the Court of Appeals. In either event, the plaintiffs are not now entitled to have this cause remanded for the purpose of a new trial and the taking of additional evidence.

An examination of the complaint initially filed by the plaintiffs in this action shows a failure to properly plead a violation of the Fair Housing Act. Reference is made to the Fair Housing Act at three points in the complaint. However, none of these references indicate what section of the Fair Housing Act is purportedly violated and, in each instance, the reference is included in the enumeration of the Fourteenth Amendment and other statutes as part of a legal conclusion.

As indicated above, the trial court specifically found that no specific section of the Fair Housing Act was referred to in the pleadings and that none was applicable to the facts of this case. This finding of fact, both with respect to the pleadings and the impact of the evidence adduced, was not in any way clearly erroneous, and the findings of the District Court should therefore not be set aside in this respect. Fed. R. Civ. P., Rule 52; *Marr* v. *Rife*, 503 F. 2d 735, 740 (6th Cir. 1974).

In alleging violations of the statute, the plaintiffs had a duty to make such allegations clear and specific. When one seeks relief under a civil rights statute, there must be specific allegations of the injury and the statutory basis that gives rise to a cause of action. *Warth* v. *Seldin*, 422 U. S. 490 (1975), 45 L. Ed. 2d 343,

356, 366. At page 356, the Court said: "Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." At page 366, the Court said:

> "The rules of standing, whether as aspects of the Art III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. We agree with the District Court and the Court of Appeals that none of the petitioners here has met this threshold requirement. Accordingly, the judgment of the Court of Appeals is affirmed."

It is clear that the allegations of the complaint not only were not supported by evidence, but were insufficient in the first instance to properly raise the question of violation of the Fair Housing Act.

It should also be noted that any claim under Section 3604 of the Fair Housing Act was barred by the provisions of 42 U. S. C. § 3612, which requires that all such actions must be brought within 180 days. The Village's refusal to rezone took place on September 28, 1971. The original suit was filed on June 12, 1972. Section 3612 provides in part:

> "(a) The rights granted by sections 803, 804, 805, and 806 [§§ 3603-3606 of this title] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred . . ."

The alleged violation here was of Section 3604 and is thus covered by this six month statute of limitations. *Warren* v. *Norman Realty Co.*, 375 F. Supp. 478 (D. C. Neb. 1974); *James*

v. *Hafler*, 320 F. Supp. 39, and *Cornelius* v. *City of Parma* (U. S. D. C., N. D. Ohio, No. C73-437), decided September 27, 1973. While there may have been no statute of limitations on the Fourteenth Amendment complaint, there most certainly was on the fair housing complaint and, to the extent this case is now based on the statutory complaint, it is barred.

The Court of Appeals in its most recent opinion now claims that the statutory claim was not pursued either at the trial or appellate levels. Such a failure necessitates the conclusion that the statutory claim was waived. If the statutory claim was in fact waived, the only remaining question, the Fourteenth Amendment allegation, was decided adversely to the plaintiffs by this Court's original opinion in this case, and the Court of Appeals, on finding that the statutory claim was waived, should have then affirmed the trial court without a remand.

CONCLUSION.

This Court should grant the writ of certiorari because the recent opinion of the Court of Appeals is clearly contrary to this Court's recent holdings in *Washington* v. *Davis*, 426 U. S. 229, and *Hills* v. *Gautreaux*, 425 U. S. 284. The opinion reads into the Fair Housing Act a compelling justification test, which this Court specifically disavowed in *Washington* v. *Davis*. It takes away the right of local municipalities to enforce their zoning and other land use restrictions as applied to low income housing projects, in total violation of this Court's directive in *Gautreaux*.

The Court's opinion means that the refusal to amend an admittedly valid zoning ordinance would violate the Fair Housing Act because that ordinance prevented the construction on a specific site of a low income housing project, which might include members of a racial minority in its tenancy. The Court of Appeals attempts to shift the burden to a defendant municipality, contrary to the repeated decisions of the federal courts,

including those of the Seventh Circuit, with respect to the plaintiffs' burden in fair housing litigation. Finally, we suggest that the Court's own recognition that the fair housing claim was waived at the trial level and at the appellate level dictated the conclusion that the only remaining question, that of the Fourteenth Amendment violation, has already been passed upon by this Court.

The remand to the trial court, circumscribed by a set of guidelines, which finds no support in statute or case law, does violence to the normal course of judicial proceedings. The holding of the Court of Appeals, if permitted to stand, will constitute judicial legislation and write into the Fair Housing Act something never intended or contemplated by Congress.

The Court of Appeals for the Seventh Circuit has rendered a decision on an extremely important and far reaching question, which we suggest is clearly in conflict with the decisions of this Court and other courts of appeal. It is a vitally important question of federal law, which should be settled by this Court and the petition should be granted.

Respectfully submitted,

JACK M. SIEGEL,
39 South LaSalle Street,
Chicago, Illinois 60603,
312-263-2968,
Attorney for Petitioners, Village of Arlington Heights, et al.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1326

METROPOLITAN HOUSING DEVELOPMENT CORP., ET AL.,
Plaintiffs-Appellants,

vs.

VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Defendants-Appellees,

NORTHWEST OPPORTUNITY CENTER and
ELUTERIA D. MALDONADO,
Intervening Plaintiffs-Appellants.

On Remand from the Supreme Court of the United States.

DECIDED July 7, 1977

Before FAIRCHILD, *Chief Judge,* SWYGERT and SPRECHER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* In this case plaintiffs seek to compel defendant, the Village of Arlington Heights, Illinois ("the Village"), to rezone plaintiffs' property to permit the construction of federally financed low-cost housing. Plaintiffs contend that defendant's refusal to rezone the property was racially discriminatory. The Supreme Court has determined that defendant's action did not violate the Equal Protection Clause. The

remaining issue is whether the refusal to rezone was illegal under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* We hold that under the circumstances of this case defendant has a statutory obligation to refrain from zoning policies that effectively foreclose the construction of any low-cost housing within its corporate boundaries, and remand the case to the district court for a determination of whether defendant has done so.

I

We will briefly review the history of this case, which has been well documented in previously reported decisions.

The Clerics of St. Viator are a religious order who own eighty acres of property in Arlington Heights. Part of the site is occupied by the Clerics' high school and novitiate building, but much of it remains vacant land. In 1970 the Clerics decided to use some of the vacant land for low and moderate income housing. It contacted the Metropolitan Housing Development Corporation ("MHDC"), a nonprofit developer which had experience in using federal subsidies to build low-cost housing. On November 7, 1970, the Clerics agreed to sell MHDC fifteen acres in the southeast corner of the property in exchange for $300,000. Execution of the sale was contingent, however, upon the securing of proper zoning from the Village and an agreement from the federal government to provide financial assistance under section 236 of the National Housing Act, 12 U.S.C. §1715z-1.[1]

The Clerics' property has been zoned R-3, requiring detached single family homes, since the Village first adopted a zoning ordinance in 1959. MHDC intended to construct 190 connected townhouse units, in twenty two-story buildings. Therefore, it could not proceed unless the property was rezoned R-5, the Village's multiple family dwelling classification. It accordingly

1. The parties simultaneously entered into a 99-year lease which was effective immediately. The leasehold would also expire if proper zoning and section 236 approval could not be obtained.

filed a petition for rezoning with the Village. The material supporting the petition described the proposed development, which was to be called Lincoln Green, and stated that the development's purpose was to use section 236 subsidies to make it possible for people of low and moderate incomes to live in Arlington Heights. It also revealed that the federal government would not subsidize housing under section 236 unless a proposed development was to be racially integrated.

On September 28, 1971, the Village Board of Trustees voted to deny the petition for rezoning. MHDC, along with three black individuals, then filed suit against the Village in the district court for the Northern District of Illinois, seeking declaratory and injunctive relief on the ground that the Village's refusal to rezone was racially discriminatory and violated their rights under the Equal Protection Clause, 42 U.S.C. §§ 1981-83, and the Fair Housing Act. After a trial, the district court held that the Village's action did not violate the Equal Protection Clause[2] because plaintiffs had failed to prove that the zoning decision would affect members of racial minorities, as opposed to poor people in general, adversely. The court also found that the decision was not motivated by racial discrimination or opposition to poor people, but "by a legitimate desire to protect property values and the integrity of the Village's zoning plan." 373 F. Supp. 208, 211 (N. D. Ill. 1974).

This court reversed the district court's judgment. We first held that the district court's finding that the Village's refusal to rezone was motivated by factors unrelated to racial discrimination was not clearly erroneous. We rejected, however, the court's finding that the zoning decision did not have a discriminatory effect. Section 236 required that subsidized housing be limited to low or middle income tenants. Black people in the Chicago metropolitan area, who on the average earn less than

2. The court declined to decide the merits of plaintiffs' claim under the Fair Housing Act, apparently because plaintiffs did not pursue it or did not view it as different from their constitutional claim. *See* 373 F. Supp. at 209.

white people in that area, constituted forty percent of the group eligible for section 236 subsidization but only eighteen percent of the area's total population. Since Arlington Heights is in the Chicago metropolitan area, the Village's decision, which effectively precluded the construction of low-cost housing on plaintiff's property, constituted a greater deprivation of housing opportunities for black people than for white people.

We then noted that the fact that the Village's action created a racially disparate impact did not, by itself, subject that action to strict scrutiny under the Equal Protection Clause. But we also concluded that the discriminatory effect of the refusal to rezone could not be examined in a vacuum. Housing patterns in Arlington Heights reflected rigid racial segregation. In 1970 only twenty-seven out of the Village's 64,884 residents, compared to eighteen percent of the residents of the entire Chicago metropolitan area, were black. Moreover, the Village had not taken any affirmative steps to construct low-cost housing which would help remedy this lopsided disparity. In this historical context, the Village's refusal to permit MHDC to build Lincoln Green could not be upheld absent a compelling interest in support of the Village's decision. Since the Village could supply no such compelling justification, we held that it had violated the Equal Protection Clause. 517 F.2d 409, 412-15 (7th Cir. 1974).

The Supreme Court reversed. Although the Court did not question our conclusion that the Village's zoning decision had a racially discriminatory effect, it noted that under *Washington* v. *Davis*, 426 U.S. 229 (1976), decided after we had issued our opinion in this case, a showing of discriminatory intent was a prerequisite to establishing a violation of the Equal Protection Clause. Since we had affirmed the district court's finding that there was no discriminatory purpose behind the Village's refusal to rezone, the Court held that plaintiffs had suffered no deprivation of their constitutional rights. 45 U.S.L.W. 4073, 4077-78 (U.S., Jan. 11, 1977).

The Court then remanded the case for a determination of whether the Village's conduct violated the Fair Housing Act. *Id.* at 4078-79. We had not decided the statutory question because, although plaintiffs' complaint mentioned the Fair Housing Act, they did not pursue the statutory claim either with the district court or with this court.[3]

II

The Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, was enacted as Title VIII of the Civil Rights Act of 1968. Plaintiffs contend that the Village's refusal to rezone violated two of the Act's provisions. The first is 42 U.S.C. § 3604(a), which provides in part that "it shall be unlawful . . .[t]o make unavailable or deny . . . a dwelling to any person because of race, color, religion, or national origin." The second is 42 U.S.C. § 3617, which states:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

Defendant argues that these claims are barred by the Act's statute of limitations, which provides that civil action to enforce rights granted by section 3604 must be commenced within 180 days after the alleged discriminatory housing practice occurred. 42 U.S.C. § 3612(a). It maintains that plaintiffs failed to file this suit within 180 days after the petition for rezoning was denied.

However, we need not decide whether the complaint was timely under section 3612(a) because defendant failed to raise this issue in the pleadings. A claim that the statute of limitations bars a lawsuit is an affirmative defense and it must be pleaded

3. *See* note 2 *supra*.

or it will be considered waived.[4] *See* Fed.R.Civ.P. 8(c);*Weinberger* v. *Salfi*, 442 U.S. 749, 764 (1975). Accordingly, we will proceed to the merits of this case.

III

In determining whether the Village's failure to rezone violated the Fair Housing Act, it is important to note that the Supreme Court's decision does not require us to change our previous conclusion that the Village's action had a racially discriminatory effect. What the Court held is that under the Equal Protection Clause that conclusion is irrelevant.

We reaffirm our earlier holding that the Village's refusal to rezone had a discriminatory effect. The construction of Lincoln Green would create a substantial number of federally subsidized low-cost housing units which are not presently available in Arlington Heights. Because a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to permit MHDC to construct the project had a greater impact on black people than on white people. Moreover, Arlington Heights remains almost totally white in a metropolitan area with a significant percentage of black people. Since Lincoln Green would have to be racially integrated in order to qualify for federal subsidization, the Village's action in preventing the project from being built had the effect of perpetuating segregation in Arlington Heights.

The basic question we must answer is whether the Village's action violated sections 3604(a) or 3617 because it had discriminatory effects when that action was taken without discriminatory intent. Since the violation of section 3617 alleged in this case depends upon a finding that the Village interfered

4. Because of our disposition of this issue, we need not decide whether the statute of limitations contained in section 3612 is applicable to actions brought under section 3617.

with rights granted or protected by section 3604(a),[5] we can confine our inquiry to whether the refusal to rezone made unavailable or denied a dwelling to any person because of race within the meaning of section 3604(a). In resolving this issue we must address ourselves to two preliminary sub-issues: first, whether a finding that an action has a discriminatory effect, without a concomitant finding that the action was taken with discriminatory intent, is ever enough to support the conclusion that the action violated section 3604(a); and, if so, under what factual circumstances will it be enough?

A.

The major obstacle to concluding that action taken without discriminatory intent can violate section 3604(a) in the phrase "because of race" contained in the statutory provision. The narrow view of the phrase is that a party cannot commit an act "because of race" unless he intends to discriminate between races. By hypothesis, this approach would excuse the Village from liability because it acted without discriminatory intent. The broad view is that a party commits an act "because of race" whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent. Under this statistical, effect-oriented view of causality, the Village could be liable since the natural and foreseeable consequence of its failure to rezone was to adversely affect black people seeking low-cost housing and to perpetuate segregation in Arlington Heights.

5. One court has held that a violation of section 3617 can be established without first establishing a violation of sections 3603, 3604, 3605, or 3606 because to interpret section 3617 otherwise would make it superfluous. *Laufman* v. *Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 497-98 (S.D. Ohio 1976). We decline to decide whether section 3617 can ever be violated by conduct that does not violate any of the four earlier sections. We do hold, however, that under the circumstances of this case, where the conduct that allegedly violated section 3617 is the same conduct that allegedly violated section 3604(a) and was engaged in by the same party, the validity of the section 3617 claim depends upon whether the failure to rezone violated section 3604(a).

The Supreme Court adopted the narrow view for equal protection purposes in *Washington* v. *Davis*, and defendant argues that that decision should bind us in this case as well. However, *Washington* undercuts more than it supports defendant's position. In that case, the Court created a dichotomy between the Equal Protection Clause and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Although the Court announced its new intent requirement for equal protection cases, it reaffirmed the viability of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in which it had previously held that an employment practice that produced a racially discriminatory effect was invalid under Title VII unless it was shown to be job-related. 426 U.S. at 238-39, 246-48. Thus, a prima facie case of employment discrimination can still be established under Title VII by statistical evidence of discriminatory impact, without a showing of discriminatory intent. *See United States* v. *City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977).

Defendant asserts that Title VII is distinguishable from the Fair Housing Act because Congress in Title VII mandated a more probing standard of review than it did under the Fair Housing Act. An examination of the two statutes, however, does not indicate Congress intended that proof of discriminatory intent was unnecessary under one but necessary under the other. Section 703(h) of Title VII, codified at 42 U.S.C. § 2000e-2(h), states in relevant part:

> [N]or shall it be an unlawful practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

The Supreme Court in *Griggs* held that this provision did not sanction all employment tests administered without discriminatory intent, in spite of the "because of race" language that it contains. Rather, the Court looked to the general congressional

purpose in enacting Title VII—which was to achieve equality of employment opportunities—and interpreted section 703(h) in a broad fashion in order to effectuate that purpose.[6] 401 U.S. at 429-36.

The purpose of Congress in enacting the Fair Housing Act was "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Second Circuit has observed that the Act was intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973). Other courts have responded to the congressional statement of policy by holding that the Act must be interpreted broadly. *See, e.g., Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Mayers* v. *Ridley*, 465 F.2d 630, 632-35 (*en banc*) (Wright, J., *concurring*); *Laufman* v. *Oakley Bldg. & Loan Co.*, 409 F.Supp. 489 (S.D. Ohio 1976); *United States* v. *City of Parma*, [1973] Equal Opportunity in Housing Rptr. (Prentice-Hall) ¶ 13,616 (N.D. Ohio 1973). *See also Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441, 4444 (U.S., May 3, 1977) (recognizing that "Congress has made a strong national commitment to promoting integrated housing"); *Griffin* v. *Breckinridge*, 403 U.S. 88, 97 (1971) (Supreme Court has interpreted civil rights statutes broadly).

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6. The Court did not directly construe the "because of race" language in section 703(h). Instead, it held that "any professionally developed ability test" only included tests that were job-related. 401 U.S. at 436. By reading the statutory language in this manner the Court rendered the second half of the provision superfluous since a job-related test would never be "designed, intended or used to discriminate because of race."

The important point to be derived from *Griggs* is that the Court did not find the "because of race" language to be an obstacle to its ultimate holding that intent was not required under Title VII. It looked to the broad purposes underlying the Act rather than attempting to discern the meaning of this provision from its plain language.

In light of the declaration of congressional intent provided by section 3601 and the need to construe the Act expansively in order to implement that goal, we decline to take a narrow view of the phrase "because of race" contained in section 3604(a). Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment "to replace the ghettos 'by truly integrated and balanced patterns'." *Trafficante,* 409 U.S. at 211, *citing* 114 Cong. Rec. 3422 (remarks of Sen. Mondale). Moreover, a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. "[I]ntent, motive, and purpose are elusive subjective concepts," *Hawkins* v. *Town of Shaw,* 461 F.2d 1171, 1172 (5th Cir. 1972) (*en banc*) (*per curiam*), and attempts to discern the intent of an entity such as a municipality are at best problematic. *See Hart* v. *Community School Board of Education,* 512 F.2d 37, 50 (2d Cir. 1975); Note, *Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction,* 86 Yale L. J. 317, 322-26 (1976). A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1, 28-29 (1976).

We therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent. A number of courts have agreed. *See, e.g., Smith* v. *Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *United States* v. *City of Black Jack,* 508 F.2d 1179, 1183 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *Kennedy Park Homes Assoc., Inc.* v. *City of Lackawanna,* 436 F.2d 108, 114 (2d Cir. 1970) (dictum), *cert. denied,* 401 U.S. 1010 (1971); *Resident Advisory Board* v. *Rizzo,* 425 F. Supp. 987, 1021-24 (E.D. Pa. 1976).

B.

Plaintiffs contend that once a racially discriminatory effect is shown a violation of section 3604(a) is necessarily established. We decline to extend the reach of the Fair Housing Act this far. Although we agree that a showing of discriminatory intent is not required under section 3604(a), we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases. *See* Brest, *Foreword,* 90 Harv. L. Rev. at 29. Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute.

We turn now to determining under what circumstances conduct that produces a discriminatory impact but which was taken without discriminatory intent will violate section 3604(a). Four critical factors are discernible from previous cases. They are: (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington* v. *Davis;* (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. We shall examine each of these factors separately.

1. There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. *See Trafficante*, 409 U.S. at 209-10.

In this case the discriminatory effect in the first sense was relatively weak. It is true that the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area. But it is also true that the class disadvantaged by the Village's action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white. The argument for *racial* discrimination is therefore not as strong as it would be if all or most of the group adversely affected was nonwhite. *Compare Resident Advisory Board* v. *Rizzo*, 425 F. Supp. 987, 1018 (E.D. Pa. 1976), in which plaintiffs sought to compel the construction of public housing in a predominantly white neighborhood of Philadelphia. Since ninety-five percent of the individuals on the waiting list for public housing in Philadelphia were members of minority groups, the failure to build public housing had a much greater adverse effect on nonwhite people than on white people.

The fact that the conduct complained of adversely affected white as well as nonwhite people, however, is not by itself an obstacle to relief under the Fair Housing Act. *See United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 442 U.S. 1042 (1975); *Kennedy Park Homes Assoc., Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). In both of these cases local zoning ordinances prevented the construction of low-income

housing projects which would not have been limited to nonwhite people. Both courts nonetheless found a racially discriminatory effect.

What was present in *Black Jack* and *Kennedy Park* was a strong argument supporting racially discriminatory impact in the second sense. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white.[7] Moreover, in each case construction of low-cost housing was effectively precluded throughout the municipality or section of the municipality which was rigidly segregated.[8] Thus, the effect of the municipal action in both cases was to foreclose the possibility of ending racial segregation in housing within those municipalities.

It is unclear in this case whether the Village's refusal to rezone would necessarily perpetuate segregated housing in Arlington Heights. The Village remains overwhelmingly white at the present time,[9] and the construction of Lincoln Green would

7. The area of St. Louis County which included the City of Black Jack was approximately ninety-nine percent white. 508 F.2d at 1183.

The City of Lackawanna has three wards. 98.9 percent of Lackawanna's nonwhite citizens lived in the First Ward, and they constituted 35.4 percent of that ward's population. The Third Ward, where the proposed project was to be built, had 12,229 residents, of whom twenty-nine were black. 436 F.2d at 110; 318 F. Supp. at 674.

8. In *Black Jack*, the city had enacted a zoning ordinance prohibiting the construction of new multiple family dwellings. 508 F.2d at 1183. In *Kennedy Park*, the city imposed a moratorium on the construction of new subdivisions, a category into which the proposed project fell. 436 F.2d at 111.

9. Defendant asserts that the minority population of Arlington Heights has grown substantially since 1970. It contends that a special census in 1976 showed a black population of 200 and a total nonwhite population of 848. Defendant does not inform us what the total population of the Village now is, but even assuming that it has remained the same since 1970 and that defendant's statements about the 1976 census are accurate, Arlington Heights would be approximately ninety-nine percent white. We find these numbers to be evidence of "overwhelming" racial segregation.

be a significant step toward integrating the community. The Village asserts, however, that there is a substantial amount of land within its corporate limits which is properly zoned for multiple family dwellings and on which it would have no objection to the construction of a low-cost housing project. Plaintiffs reply that all other sites within the Village limits are unsuitable under federal guidelines governing subsidized housing. The district court never resolved this issue.

2. The second factor which appears to have been important in previous Fair Housing Act cases which focused on the discriminatory effect of the defendant's conduct was the presence of some evidence of discriminatory intent. In three cases this evidence was insufficient to independently support the relief which the plaintiff sought. *See Smith* v. *Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Black Jack*, 508 F.2d at 1185 n. 3; *Resident Advisory Board* v. *Rizzo*, 425 F.Supp. at 1021-25 (E.D. Pa. 1976).[10] In another case the court found the defendant liable on both a discriminatory intent and a discriminatory impact theory. *See Kennedy Park*, 436 F.2d at 112-14, *aff'g*, 318 F. Supp. at 694-95.

These courts did not address the role that evidence of intent ought to play in determining whether liability should be imposed because of discriminatory impact. But it is evident that the equitable argument for relief is stronger when there is some direct evidence that the defendant purposefully discriminated against members of minority groups because that evidence supports the inference that the defendant is a wrongdoer. Thus, the absence of any such evidence in this case is a factor buttressing the Village's contention that relief should be denied.

We conclude, however, that this criterion is the least important of the four factors that we are examining. By hypothesis, we are dealing with a situation in which the evidence of intent constitutes an insufficient basis on which to ground relief. If we were to place great emphasis on partial evidence of purposeful discrimination we would be relying on an inference—that the defendant is a wrongdoer—which is at best conjectural. In addition, the problems associated with requiring conclusive proof of discriminatory intent which we earlier discussed remain troublesome in any attempt to weigh partial evidence of intent.

10. In *Rizzo* some of the defendants were found liable without a finding of discriminatory intent while other defendants were held liable on both an intent and an impact theory.

The difficulties which arise from taking account of partial evidence of intent can be illuminated by comparing this case to *Black Jack*. In *Black Jack* plaintiffs proposed to build a low-cost integrated housing project in an overwhelmingly white unincorporated area of St. Louis County. The residents of the area blocked the construction of the project by incorporating the area into a city and then enacting a zoning ordinance prohibiting the construction of new multiple family dwellings. The court referred to evidence that opposition to the project was expressed in racial terms by the leaders of the incorporation movement and by the zoning commissioners themselves. 508 F.2d at 1185 n. 3. Moreover, the fact that the zoning ordinance was not enacted until after plans for the project were revealed is further evidence of discriminatory intent which is absent from the case at bar.

It is undeniable that this partial evidence of discriminatory intent undermined the equitable position of the city of Black Jack. In cases such as these, which place broad national goals in conflict with heretofore established local prerogatives, courts must take account of the facts particular to each case. But too much reliance on this evidence would be unfounded. The bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis. *See Washington* v. *Davis*, 426 U.S. at 253 (Stevens, J., concurring). If the goal of most of the residents of Black Jack was to protect local property values rather than to exclude black people, it would be unfair to substantially distinguish between Black Jack and Arlington Heights. Nor is it clear that Black Jack acted with more discriminatory intent than Arlington Heights because

Black Jack's zoning ordinance was enacted in reaction to a proposed integrated development while Arlington Heights' zoning ordinance was enacted years in advance of the plans to build Lincoln Green. If the effect of a zoning scheme is to perpetuate segregated housing,[11] neither common sense nor the rationale of the Fair Housing Act dictates that the preclusion of minorities in advance should be favored over the preclusion of minorities in reaction to a plan which would create integration.

3. The third factor which we find to be important is the interest of the defendant in taking the action which produces a discriminatory impact. If the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be overly solicitous when the effect is to perpetuate segregated housing. *See Smith* v. *Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976). Similarly, if the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate governmental action. *See Kennedy Park*, 436 F.2d at 113-14. *Cf. United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799, 808-09 (5th Cir. 1974) (decided on equal protection grounds). On the other hand, if the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act. *See Joseph Skillken & Co.* v. *City of Toledo*, 528 F.2d 867, 876-77 (6th Cir. 1975), *vacated and remanded*, 45 U.S.L.W. 3508 (U.S., Jan. 25, 1977).

In this case the Village was acting within the scope of the authority to zone granted it by Illinois law. *See* Ill. Rev. Stat. Ch. 24, §§ 11-13-1 *et seq*. Moreover, municipalities are traditionally afforded wide discretion in zoning. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). Therefore, this factor weakens plaintiffs' case for relief.

11. As we have already noted, it is unclear from the record whether the effect of the Village's zoning scheme, combined with its refusal to rezone the land in question, is to preclude the construction of low-cost housing in Arlington Heights and therefore to perpetuate segregated housing. There was no question about the discriminatory effect of the zoning ordinance in *Black Jack*.

4. The final criterion which will inform the exercise of our discretion is the nature of the relief which the plaintiff seeks. The courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction. To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy. By contrast, the courts are far more willing to prohibit even nonintentional action by the state which interferes with an individual's plan to use his own land to provide integrated housing. *See Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The Second Circuit has explicitly relied on the distinction between requiring affirmative action on the part of the defendant and preventing the defendant from interfering with the plaintiff's attempt to build integrated housing in deciding whether to grant relief under the Fair Housing Act. *Compare Citizens Committee for Faraday Wood* v. *Lindsay*, 507 F.2d 1065, 1069 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), and *Acevedo* v. *Nassau County*, 500 F.2d 1078, 1081 (2d Cir. 1974), *with Kennedy Park, supra. See also Joseph Skillken & Co.* v. *City of Toledo*, 528 F.2d at 878.

This factor favors plaintiffs in this case. They own the land on which Lincoln Green would be built and do not seek any affirmative help from the Village in aid of the project's construction. Rather, they seek to enjoin the Village from interfering with their plans to dedicate their land to furthering the congressionally sanctioned goal of integrated housing.

C.

Analysis of the four factors that we have enumerated reveals that this is a close case. The Village is acting pursuant to a legitimate grant of authority and there is no evidence that its refusal to rezone was the result of intentional racial discrimination. On the other hand, plaintiffs are seeking to effectuate the national goal of integrated housing within Arlington Heights and are asking nothing more of the Village than that they be allowed to pursue that objective. Whether the Village's refusal to rezone has a strong discriminatory impact because it effectively assures that Arlington Heights will remain a segregated community is unclear from the record.

In our judgment the resolution of this case turns on clarification of the discriminatory effect of the Village's zoning decision. We hold that, if there is no land other than plaintiffs' property within Arlington Heights which is both properly zoned and suitable for federally subsidized low-cost housing, the Village's refusal to rezone constituted a violation of section 3604(a). Accordingly, we remand the case to the district court for a determination of this question subject to the guidelines which we shall lay down. Since the Village's zoning powers must give way to the Fair Housing Act,[12] the district court should grant plaintiffs the relief they request if it finds that the Act has been violated.[13]

We realize that, even assuming that plaintiffs are able to show a strong discriminatory effect, only two of the four criteria on which we have focused point toward the granting of relief. As we have already noted, however, the factor of

12. *See* 42 U.S.C. § 3615.

13. We note that Lincoln Green would conform with the standard set by the Village's multiple family zoning classification. We need not reach the question of whether plaintiffs would have been entitled to relief if Lincoln Green had been out of conformance with the Village's multiple family zoning classification as well as its single family zoning classification.

whether there is some evidence of discriminatory intent should be partially discounted. Moreover, if we are to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing.

IV

We shall now describe the procedure which the district court should follow on remand.

The district court must first determine whether this case is moot. The original federal subsidy for Lincoln Green was to be obtained pursuant to section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. In 1973, however, the Government suspended new commitments for section 236 payments. Therefore, Lincoln Green can only be built if plaintiffs can obtain another subsidy.

Plaintiffs contended before the Supreme Court that alternative subsidization would be available under section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. They carry the burden of proving this assertion in the district court.

Plaintiffs must also demonstrate to the district court that Lincoln Green would be racially integrated. They had previously discharged this burden by relying on the requirement of racial integration imposed by section 236. Since section 236 is no longer applicable, plaintiffs must either show that section 8 imposes a similar requirement or otherwise satisfy the court that the tenants of the project would be substantially nonwhite.

Assuming that section 8 funds are available, the district court must then determine whether there is any land in Arlington Heights that is both zoned R-5 and suitable for federally subsidized low-cost housing. The decision as to whether a parcel of land is "suitable" will be greatly simplified by section 8 itself. Section 8(e) sets out restrictions on subsidies granted under section 8, and section 8(e)(3) states: "[t]he construction or substantial rehabilitation of dwelling units to be assisted under

this section shall be eligible for financing with mortgages insured under the National Housing Act." The National Housing Act, 12 U.S.C. § 1713(c)(3),[14] provides upper limits on the cost of mortgages for housing which is eligible for mortgage insurance. The district court should use these upper limits as guidelines in determining whether the cost of a parcel of land would prohibit the construction of low-cost housing.[15] The court should also take account of any other requirements imposed by federal law.

14. 12 U.S.C. § 1713(c)(3) states, in part:

> (c) To be eligible for insurance under this section a mortgage on any property or project shall involve a principal obligation in an amount—
>
> * * *
>
> (3) not to exceed, for such part of the property or project as may be attributable to dwelling use (excluding exterior land improvements as defined by the Secretary), $19,500 per family unit without a bedroom, $21,600 per family unit with one bedroom, $25,800 per family unit with two bedrooms, and $31,800 per family unit with three bedrooms, and $36,000 per family unit with four or more bedrooms or not to exceed $3,900 per space; except that as to projects to consist of elevator-type structures the Secretary may, in his discretion, increase the dollar amount limitations per family unit not to exceed $22,500 per family unit without a bedroom, $25,200 per family unit with one bedroom, $30,900 per family unit with two bedrooms, and $38,700 per family unit with three bedrooms, and $43,758 per family unit with four or more bedrooms, as the case may be, to compensate for the higher costs incident to the construction of elevator-type structures of sound standards of construction and design; and except that the Secretary may, by regulation, increase any of the foregoing dollar amount limitations contained in this paragraph by not to exceed 50 per centum in any geographical area where he finds that cost levels so require.

15. The court will still have some discretion because the statutory limits on mortgage costs cover the combined cost of land and the construction of housing while the court will only be considering the variable of land costs. However, the court should be able to obtain objective evidence of the cost of constructing a development such as Lincoln Green aside from the cost of land. By treating the cost of construction as a constant, the court will be in a position to determine whether the cost of a parcel of land, when added to that constant, exceeds the statutory limits.

In conducting its inquiry, the district court should place on defendant the burden of identifying a parcel of land within Arlington Heights which is both properly zoned and suitable for low-cost housing under federal standards.[16] If defendant fails to satisfy this burden, the district court should conclude that the Village's refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within Arlington Heights,[17] and should grant plaintiffs the relief they seek.

The cause is remanded for further proceedings consistent with this opinion. Pursuant to Circuit Rule 18, the cause should be heard on remand by a new district judge.

FAIRCHILD, *Chief Judge*, concurring. With all respect, I do not subscribe to all the principles and analytical steps described in the opinion prepared for the court by Judge Swygert.

The ultimate question is whether the refual of the zoning change made a dwelling unavailable to plaintiff Ransom (and others) because of race. If it did, the refusal was unlawful under 42 U.S.C.§ 3604(a).

After trial, the district court found that the Village has 60 tracts zoned for R-5 use and some of it is still vacant and available to plaintiff. The proof showed nine undeveloped tracts in excess of 15 acres, zoned R-5. It was not established whether or not these were suitable for low-cost housing under federal

16. The concurrence argues that plaintiffs ought to bear the burden on this issue. Allocating the burden in this fashion, however, would compel plaintiffs to attempt the almost impossible task of proving a negative. It is far easier for defendant to show that a single parcel of land which is suitable does exist than for plaintiffs to show that no suitable land exists.

17. Defendant asserts that it has fulfilled any obligation with respect to low and moderate-income housing because it is committed to building one hundred fifty units of such housing in the next three years. We disagree. Even assuming that defendant's assertion is accurate and that the commitment will be carried out, Arlington Heights would remain highly segregated. The Village's plan, though laudable, cannot excuse its interference with the plans of individual landowners who are trying to build integrated housing and lessen that segregation.

standards. A preliminary question arises as to why plaintiffs should have a second chance at this element of the case. I am satisfied that the mandate of the Supreme Court for further consideration of plaintiffs' statutory claim is a reason for affording a second inquiry in this area. The majority's answer appears to be that the Village has the burden on this issue. It seems to be, however, that traditional principles apply and burden should be allocated to plaintiffs.

Arlington Heights is a community of substantial size (64,000 in 1970). It seems clear that housing there is presently almost totally confined to white persons. The substantial percentage of minority persons in the whole metropolitan community and the fact that minority persons are employed in Arlington Heights render it improbable that existing housing segregation there can represent free choice among persons who might reasonably consider living there. Zoning is appropriate for regulating the location of land use within a community. With exceptions, which are rare in this context, it is not appropriate for total exclusion. If on remand it be demonstrated that no suitable site with proper zoning is available, I can accept the conclusion that the denial of a change in zoning was, in the circumstances of this case, unlawful under 42 U.S.C. § 3604(a).

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

..... U. S. ....., 50 L. Ed. 2d 450, 97 S. Ct. .....,

SUPREME COURT OF THE UNITED STATES

No. 75-616

VILLAGE OF ARLINGTON HEIGHTS, et al., *Petitioners,* *vs.* METROPOLITAN HOUSING DEVELOPMENT CORPORATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 11, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low and moderate income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois.[1] They alleged that the denial was racially discriminatory

1. Respondents named as defendants both the Village and a number of its officials, sued in their official capacity. The latter were the Mayor, the Village Manager, the Director of Building and Zon-

(Footnote continued on next page)

and that it violated, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968, 42 U. S. C. § 3601 *et seq.* Following a bench trial, the District Court entered judgment for the Village, 373 F. Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F. 2d 409 (1975). We granted the Village's petition for certiorari, 423 U. S. 1030 (1975), and now reverse.

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (the Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the back yards of other single-family homes.

(Footnote continued from preceding page.)
ing, and the entire Village Board of Trustees. For convenience, we will occasionally refer to all the petitioners collectively as "the Village."

The Order decided in 1970 to devote some of its land to low and moderate income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act, 12 U. S. C. § 1715z-1.[2]

MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low and moderate income housing throughout the Chicago area. In 1970 MHDC was in the process of building one § 236 development near Arlington Heights and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale

2. Section 236 provides for "interest reduction payments" to owners of rental housing projects which meet the Act's requirements, if the savings are passed on to the tenants in accordance with a rather complex formula. Qualifying owners effectively pay one percent interest on money borrowed to construct, rehabilitate or purchase their properties. (Section 236 has been amended frequently in minor respects since this litigation began. See 12 U. S. C. § 1715z-1 (1970 ed., Supp. V), and the Housing Authorization Act of 1976, Pub. L. No. 94-375, § 4, 90 Stat. 1070).

New commitments under § 236 were suspended in 1973 by executive decision, and they have not been revived. Projects which formerly could claim § 236 assistance, however, will now generally be eligible for aid under § 8 of the Housing and Community Development Act of 1974, 42 U. S. C. § 1437f (1970 ed., Supp. V), as amended by Housing Authorization Act of 1976, Pub. L. No. 94-375, § 2, 90 Stat. 1068. Under the § 8 program, the Department of Housing and Urban Development contracts to pay the owner of the housing units a sum which will make up the difference between a fair market rent for the area and the amount contributed by the low-income tenant. The eligible tenant family pays between 15 and 25% of its gross income for rent. Respondents indicated at oral argument that, despite the demise of the § 236 program, construction of the MHDC project could proceed under § 8 if zoning clearance is now granted.

agreement was contingent upon MHDC's securing zoning clearances from the Village and § 236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of $300,000, low enough to comply with federal limitations governing land acquisition costs for § 236 housing.

MHDC engaged an architect and proceeded with the project, to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from the outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under § 236. The materials made clear that one requirement under § 236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the Spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew

large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue"—the desirability or undesirability of introducing at this location in Arlington Heights low and moderate income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: "While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location." Two members voted against the motion and submitted a minority report, stressing that in their view the change to accommodate Lincoln Green represented "good zoning." The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and in-

junctive relief.[3] A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs. The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit,[4] the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low income groups when they denied rezoning, but rather by a desire "to protect property values and the integrity of the Village's zoning plan." 373 F. Supp., at 211. The District Court concluded also that the denial would not have a racially discriminatory effect.

A divided Court of Appeals reversed. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. Deciding whether their refusal to rezone would have discriminatory effects was more complex. The court observed that the refusal would have a disproportionate impact on blacks. Based upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become tenants of Lincoln Green, although they comprised a far lower percentage of total area population. The court reasoned, however, that under our decision in *James* v. *Valtierra*, 402 U. S. 137 (1971), such a disparity in racial impact alone does not call for strict scrutiny of a municipality's decision that prevents the construction of the low-cost housing.[5]

3. The individual plaintiffs sought certification of the action as a class action pursuant to Fed. Rule Civ. Proc. 23 but the District Court declined to certify. 373 F. Supp., at 209.

4. A different district judge had heard early motions in the case. He had sustained the complaint against a motion to dismiss for lack of standing, and the judge who finally decided the case said he found "no need to re-examine [the predecessor judge's] conclusions" in this respect. 373 F. Supp., at 209.

5. Nor is there reason to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing. *Lindsey* v. *Normet*, 405 U. S. 56, 73-74 (1972). See generally *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 18-39 (1973).

There was another level to the court's analysis of allegedly discriminatory results. Invoking language from *Kennedy Park Homes Association* v. *City of Lackawanna*, 436 F. 2d 108, 112 (CA2 1970), cert. denied, 401 U. S. 1010 (1970), the Court of Appeals ruled that the denial of rezoning must be examined in light of its "historical context and ultimate effect."[6] Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been "exploiting" the situation by allowing itself to become a nearly all-white community. 517 F. 2d, at 414. The Village had no other current plans for building low and moderate income housing, and no other R-5 parcels in the Village were available to MHDC at an economically feasible price.

Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

II

At the outset, petitioners challenge the respondents' standing to bring the suit. It is not clear that this challenge was pressed in the Court of Appeals, but since our jurisdiction to decide the case is implicated, *Jenkins* v. *McKeithen*, 395 U. S. 411, 421 (1969) (plurality opinion), we shall consider it.

In *Warth* v. *Seldin*, 422 U. S. 490 (1975), a case similar in some respects to this one, we reviewed the constitutional

6. This language apparently derived from our decision in *Reitman* v. *Mulkey*, 387 U. S. 369, 373 (1967) (quoting from the opinion of the California Supreme Court in the case then under review).

limitations and prudential considerations that guide a court in determining a party's standing, and we need not repeat that discussion here. The essence of the standing question, in its constitutional dimension, "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.*, at 498-499, quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, see *United States* v. *SCRAP*, 412 U. S. 669, 688 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41-42 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 498 (1974); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

A

Here there can be little doubt that MHDC meets the constitutional standing requirements. The challenged action of the petitioners stands as an absolute barrier to constructing the housing MHDC had contracted to place on the Viatorian site. If MHDC secures the injunctive relief it seeks, that barrier will be removed. An injunction would not, of course, guarantee that Lincoln Green will be built. MHDC would still have to secure financing, qualify for federal subsidies,[7] and carry through with construction. But all housing developments are subject to some extent to similar uncertainties. When a project is as detailed and

7. Petitioners suggest that the suspension of the § 236 housing assistance program makes it impossible for MHDC to carry out its proposed project and therefore deprives MHDC of standing. The District Court also expressed doubts about MHDC's position in the case in light of the suspension. 373 F. Supp., at 211. Whether termination of all available assistance programs would preclude standing is not a matter we need to decide, in view of the current likelihood that subsidies may be secured under § 8 of the Housing and Community Development Act of 1974. See n. 2, *supra*.

specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy. MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 38.

Petitioners nonetheless appear to argue that MHDC lacks standing because it has suffered no economic injury. MHDC. they point out, is not the owner of the property in question, Its contract of purchase is contingent upon securing rezoning.[8] MHDC owes the owners nothing if rezoning is denied.

We cannot accept petitioners' argument. In the first place, it is inaccurate to say that MHDC suffers no economic injury from a refusal to rezone, despite the contingency provisions in its contract. MHDC has expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning. Unless rezoning is granted, many of these plans and studies will be worthless even if MHDC finds another site at an equally attractive price.

Petitioners' argument also misconceives our standing requirements. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing.

8. Petitioners contend that MHDC lacks standing to pursue its claim here because a contract purchaser whose contract is contingent upon rezoning cannot contest a zoning decision in the Illinois courts. Under the law of Illinois, only the owner of the property has standing to pursue such an action. *Clark Oil & Refining Corp.* v. *City of Evanston*, 23 Ill. 2d 48, 177 N. E. 2d 191 (1961); but see *Solomon* v. *City of Evanston*, 29 Ill. App. 3d 782, 331 N. E. 2d 380 (1975).

State law of standing, however, does not govern such determinations in the federal courts. The constitutional and prudential considerations canvassed at length in *Warth* v. *Seldin*, 422 U. S. 490 (1975), respond to concerns that are peculiarly federal in nature. Illinois may choose to close its courts to applicants for rezoning unless they have an interest more direct than MHDC's, but this choice does not necessarily disqualify MHDC from seeking relief in federal courts for an asserted injury to its federal rights.

United States v. *SCRAP*, 412 U. S. at 686- 687; *Sierra Club* v. *Morton*, 405 U. S. 727, 734 (1972); *Data Processing Service* v. *Camp*, 397 U. S. 150, 154 (1970). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club* v. *Morton*, 405 U. S., at 739. The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 221 (1974).

B

Clearly MHDC has met the constitutional requirements and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Nectow* v. *Cambridge*, 277 U. S. 183 (1928); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974). But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth* v. *Seldin*, 422 U. S., at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows* v. *Jackson*, 346 U. S. 249 (1953); cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 237 (1969); *Buchanan* v. *Warley*, 245 U. S. 60, 72-73 (1917). For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own.[9]

Respondent Ransom, a Negro, works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if Lincoln Green were built he would probably move there, since it is closer to his job.

The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability." *Warth* v. *Seldin*, 422 U. S., at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in *Warth*, *id.*, at 507, 508 n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.*, at 505; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 41-42. Unlike the individual plaintiffs in *Warth*, Ransom has adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. *Warth* v. *Seldin*, 422 U. S., at 507. We therefore proceed to the merits.

III

Our decision last Term in *Washington* v. *Davis*, 426 U. S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant,

9. Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.

but it is not the sole touchstone of an invidious racial discrimination." *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases,[10] the holding in *Davis* reaffirmed a principle well established in a variety of contexts. *E.g., Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973) (schools); *Wright* v. *Rockefeller*, 376 U. S. 52, 56-57 (1964) (election districting); *Akins* v. *Texas*, 325 U. S. 398, 403-404 (1945) (jury selection).

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[12]

10. *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971); *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 461-462 (1972); cf. *United States* v. *O'Brien*, 391 U. S. 367, 381-386 (1968). See discussion in *Washington* v. *Davis*, 426 U. S. 229, 242-244 (1976).

11. In *McGinnis* v. *Royster*, 410 U. S. 263, 276-277 (1973), in a somewhat different context, we observed:

> "The search for legislative purpose is often elusive enough, *Palmer* v. *Thompson*, 403 U. S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

12. For a scholarly discussion of legislative motivation, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 116-118.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington* v. *Davis*, 426 U. S., at 242—may provide an important starting point. Sometimes a clear pattern unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Guinn* v. *United States*, 238 U. S. 347 (1915); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy.[13] But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative,[14] and the Court must look to other evidence.[15]

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane* v. *Wilson, supra; Griffin* v. *County School Board*, 377 U. S. 218 (1964); *Davis* v. *Schnell*, 81 F. Supp. 872 (SD Ala.), aff'd *per curiam*, 336 U. S. 933 (1949); cf. *Keyes* v. *School District No. 1*, 413 U. S., at 207.

13. Several of our jury selection cases fall into this category. Because of the nature of the jury selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*. See, *e. g., Turner* v. *Fouche*, 396 U. S. 346, 359 (1970); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967).

14. This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the equal protection clause. A single invidiously discriminatory governmental act—in the exercise of the zoning power as elsewhere—would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions. See *City of Richmond* v. *United States*, 422 U. S. 358, 378 (1975).

15. In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the "heterogeneity" of the nation's population. *Jefferson* v. *Hackney*, 406 U. S. 535, 548 (1972); see also *Washington* v. *Davis*, 426 U. S. at 248.

The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman* v. *Mulkey*, 387 U. S. 369, 373-376 (1967); *Grosjean* v. *American Press*, 297 U. S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing,[16] we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.[17]

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose

16. See, *e. g.*, *Progress Development Corp.* v. *Mitchell*, 286 F. 2d 222 (CA7 1961) (park board allegedly condemned plaintiffs' land for a park upon learning that the homes plaintiffs were erecting there would be sold under a marketing plan designed to assure integration); *Kennedy Park Homes Association, Inc.* v. *City of Lackawanna*, 436 F. 2d 108 (CA2 1970), cert. denied, 401 U. S. 1010 (1971) (town declared moratorium on new subdivisions and rezoned area for park land shortly after learning of plaintiffs' plans to build low income housing). To the extent that the decision in *Kennedy Park Homes* rested solely on a finding of discriminatory impact, we have indicated our disagreement. *Washington* v. *Davis*, 426 U. S., at 244-245.

17. See *Dailey* v. *City of Lawton*, 425 F. 2d 1037 (CA10 1970). The plaintiffs in *Dailey* planned to build low income housing on the site of a former school that they had purchased. The city refused to rezone the land from PF, its public facilities classification, to R-4, high-density residential. All the surrounding area was zoned R-4, and both the present and the former planning director for the city testified that there was no reason "from a zoning standpoint" why the land should not be classified R-4. Based on this and other evidence, the Court of Appeals ruled that "the record sustains the [District Court's] holding of racial motivation and of arbitrary and unreasonable action." *Id.*, at 1040.

of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *United States* v. *Nixon*, 418 U. S. 683, 705 (1974); 8 Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).[18]

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Washington* v. *Davis*, *supra*. The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision. In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants." 373 F. Supp., at 211.

On appeal the Court of Appeals focused primarily on respondents' claim that the Village's buffer policy had not been

18. This Court has recognized, ever since *Fletcher* v. *Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 420 (1971). The problems involved have prompted a good deal of scholarly commentary. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 356-361 (1949); A. Bickel, The Least Dangerous Branch, 208-221 (1962); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Brest, *supra*, n. 8.

consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals. "The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." 517 F. 2d, at 412. The Court of Appeals therefore approved the District Court's findings concerning the Village's purposes in denying rezoning to MHDC.

We also have reviewed the evidence. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities comprise 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures.[19] The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and

19. Respondents have made much of one apparent procedural departure. The parties stipulated that the Village Planner, the staff member whose primary responsibility covered zoning and planning matters, was never asked for his written or oral opinion of the rezoning request. The omission does seem curious, but respondents failed to prove at trial what role the Planner customarily played in rezoning decisions, or whether his opinion would be relevant to respondents' claims.

the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminator purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.[20]

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village decision.[21] This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried

20. Respondents complain that the District Court unduly limited their efforts to prove that the Village Board acted for discriminatory purposes, since it forbade questioning Board members about their motivation at the time they cast their votes. We perceive no abuse of discretion in the circumstances of this case, even if such an inquiry into motivation would otherwise have been proper. See n. 18, *supra*. Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper.

21. Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, No. 75-1278, *post*, p. .....

a discriminatory "ultimate effect" is without independent constitutional significance.

V

Respondents' complaint also alleged that the refusal to rezone violated the Fair Housing Act, 42 U. S. C. § 3601 *et seq.* They continue to urge here that a zoning decision made by a public body may, and that petitioners' action did, violate § 3604 or § 3617. The Court of Appeals, however, proceeding in a somewhat unorthodox fashion, did not decide the statutory question. We remand the case for further consideration of respondents' statutory claims.

Reversed and remanded.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 75-616

VILLAGE OF ARLINGTON HEIGHTS, et al., *Petitioners,* *vs.* METROPOLITAN HOUSING DEVELOPMENT CORPORATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 11, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part,

I concur in Parts I-III of the Court's opinion. However, I believe the proper result would be to remand this entire case to the Court of Appeals for further proceedings consistent with *Washington* v. *Davis,* 426 U. S. 229 (1976), and today's opinion. The Court of Appeals is better situated than this Court both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed towards those standards.

SUPREME COURT OF THE UNITED STATES

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[January 11, 1977]

MR. JUSTICE WHITE, dissenting.

The Court reverses the judgment of the Court of Appeals because it finds, after re-examination of the evidence supporting the concurrent findings below, that "respondents failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." *Ante*, p. 17. The Court reaches this result by interpreting our decision in *Washington* v. *Davis*, 426 U. S. 229 (1976), and applying it to this case, notwithstanding that the Court of Appeals rendered its decision in this case before *Washington* v. *Davis* was handed down, and thus did not have the benefit of our decision when it found a Fourteenth Amendment violation.

The Court gives no reason for its failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision. The Court's articulation of a legal standard nowhere mentioned in *Davis* indicates that it feels that the application of *Davis* to these facts calls for substantial analysis. If this is true, we would do better to allow

the Court of Appeals to attempt that analysis in the first instance. Given that the Court deems it necessary to re-examine the evidence in the case in light of the legal standard it adopts, a remand is especially appropriate. As the cases relied upon by the Court indicate, the primary function of this Court is not to review the evidence supporting findings of the lower courts. See, *e.g.*, *Writ* v. *Rockefeller*, 376 U. S. 52, 56-57 (1964); *Akins* v. *Texas*, 325 U. S. 398, 402 (1945). A further justification for remanding on the constitutional issue is that a remand is required in any event on respondents' Fair Housing Act claim, 42 U. S. C. § 3601 *et seq.*, not yet addressed by the Court of Appeals. While conceding that a remand is necessary because of the Court of Appeals' "unorthodox" approach of deciding the constitutional issue without reaching the statutory claim, *ante*, p. 18, the Court refuses to allow the Court of Appeals to reconsider its constitutional holding in light of *Davis* should it become necessary to reach that issue.

Even if I were convinced that it was proper for the Court to reverse the judgment below on the basis of an intervening decision of this Court and after a re-examination of concurrent findings of fact below, I believe it is wholly unnecessary for the Court to embark on a lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis* for a Fourteenth Amendment violation. The District Court found that the Village was motivated "by a legitimate desire to protect property values and the integrity of the Village's zoning plan." The Court of Appeals accepted this finding as not clearly erroneous, and the Court quite properly refuses to overturn it on review here. There is thus no need for this Court to list various "evidentiary sources" or "subjects of proper inquiry" in determining whether a racially discriminatory purpose existed.

I would vacate the judgment of the Court of Appeals and remand the case for consideration of the statutory issue and, if necessary, for consideration of the constitutional issue in light of *Washington* v. *Davis*.

APPENDIX C.

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517 F. 2d 409.

No. 74-1326.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, an Illinois not-for-profit Corporation, et al.,
Plaintiffs-Appellants,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, et al.,
Defendants-Appellees.

NORTHWEST OPPORTUNITY CENTER, INC., and ELUTERIA D. MALDONADO,
Plaintiffs-Appellants.

Argued Sept. 13, 1975 Decided June 10, 1975.

Before FAIRCHILD, Chief Judge, and SWYGERT and SPRECHER, Circuit Judges.

SWYGERT, Circuit Judge.

The question nn this case is whether the Village of Arlington Heights' refusal to rezone a piece of property in order to permit the construction of a housing development for low and moderate income persons violates plaintiffs' constitutional rights.

Plaintiff Metropolitan Housing Development Corporation is an Illinois non-profit corporation organized in 1968 for the

purpose of developing low and moderate income housing in the Chicago metropolitan area. It was selected by the Clerics of St. Viator, a Catholic religious order, to develop the land in question for low and moderate income housing. The Clerics have title to eighty acres of land in Arlington Heights, a suburb northwest of Chicago, on part of which is situated their novitiate and high school. The land they wish to make available is a vacant fifteen acres in the southeast corner of the acreage. This property is bounded on the east by single family homes, on the side opposite St. Viator's property, and on the west and north by undeveloped St. Viator property. The Clerics entered into a ninety-nine year lease and sale agreement with Metropolitan Housing which provided that the land was to developed for subsidized housing. The price was to be $300,000.

Metropolitan Housing proposed to use the land for a 190 unit townhouse development to be called "Lincoln Green." Under the plan more than sixty percent of the property was to be maintained as open space. The financing was to be provided pursuant to section 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1. These units would have been the only subsidized housing in Arlington Heights despite a great demand for such housing in that area.

The fifteen acres on which Lincoln Green was to be situated, like the remainder of the St. Viator property, has always been zoned R-3, single family; in fact, all of the land surrounding the property is zoned R-3. In order to build this development, however, the fifteen acres would have to be rezoned to R-5, multifamily. Since 1959 the Village has had its "Comprehensive Plan" that provides that an area should be zoned R-5 only if it represents a "buffer" zone or transition between single family zoning and commercial, industrial, or other high intensity uses.

Metropolitan Housing applied for a zoning change. As the district court found after trial, Metropolitan Housing "took the necessary administrative steps to obtain rezoning and made various changes in its proposal in an attempt to satisfy various

objections which were raised by the Village's Plan Commission." Metropolitan Housing presented studies showing that Lincoln Green would not cause major traffic problems and would make a net contribution to the Village in terms of taxes. Still, after holding public hearings, the Plan Commission recommended against the rezoning and on September 28, 1971 the Board of Trustees of the Village voted six to one to deny the request. The apparent reason for the rejection was that the property was in the middle of a completely single family area and would not act as a buffer zone as required by the Comprehensive Plan.

This suit was then instituted by Metropolitan Housing and the individual plaintiffs who seek to represent moderate income minority members who work or desire to work in Arlington Heights but cannot find decent housing there that they can afford. (Northwest Opportunity Center, another not-for-profit corporation, and Eluteria Maldonado have been allowed to intervene as plaintiffs.) The complaint alleges that the refusal to rezone perpetuated segregation and denied Metropolitan Housing the right to use its property in a reasonable manner in violation of the Fourteenth Amendment, the Civil Rights Act of 1866 (52 U.S.C.A. §§ 1981 and 1982), the Civil Rights Act of 1871 (42 U.S.C. § 1983), and the Fair Housing Act of 1968 (42 U.S.C. § 3601, et seq.). The relief requested is a declaratory judgment invalidating the Arlington Heights zoning ordinance as applied to the subject property and an injunction restraining defendants, among whom are the individual Trustees of the Village, from preventing or interfering with the development of the housing proposed by Metropolitan Housing.

After a trial on the merits the district court denied the plaintiffs any relief. It found that there were good faith reasons for the refusal to rezone and that the decision did not have a racially discriminatory effect. It held that plaintiffs were attempting to extend the Fourteenth Amendment beyond its outer limits. We disagree and reverse.

I.

[1] The first contention raised by plaintiffs is that they have been denied equal protection of the law in that the Village's zoning policy has been administered in a discriminatory manner. *See* Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). They claim that had Lincoln Green been a commercial development the zoning change would have been granted. We agree that this contention, if proved, would state a claim entitling plaintiffs to the relief sought. The district court, however, found that this claim was not proved, and we cannot say that the finding was clearly erroneous.

The evidence on this point relates to the results of other requests for zoning changes to R-5. Plaintiffs contend that sixty zoning changes to R-5 were granted to commercial developers and these changes show that the policy of using R-5 property only as a buffer zone had not been followed. Thus it is argued that the buffer zone explanation is really a "sham" excuse offered only because the Village did not wish to have a housing project for low and moderate income families.

The evidence, however, relating to both grants and denials of requested zoning changes does not require the conclusion that had Lincoln Green been a proposed commercial development the variance would have been granted despite the fact that the development would not serve as a buffer zone. Plaintiffs' own expert agreed that the Village had conformed to its Comprehensive Plan for approximately two-thirds of these sixty zoning changes. His report listed fifteen relevant instances of failure to adhere to the stated policy. Defendants' witness disputed this conclusion in regard to many of these and offered explanations for the others. Our review indicates that in only four relevant instances were there clear violations of the buffer zone policy and in another two instances a questionable violation. This must be balanced against the defendants' evidence concerning the zoning change refusals. That evidence shows that prior to the Lincoln Green rejection there were two proposed changes

rejected at least in part on the basis of the buffer zone policy and another four rejections which might have been on the basis though this was not stated. There were also two proposals that were withdrawn after the Plan Commission had recommended their rejection at least partly on the basis of the apartment policy. A third withdrawal after a rejection recommendation might have been for the same reason. Subsequent to the ruling on Metropolitan Housing's proposal, the Plan Commission recommended the rejection of two other requests on the ground of the buffer zone policy (one of these was then withdrawn and the other had not been passed upon by the Village Board at the time of trial).

The inference that can be drawn from this evidence is that Arlington Heights has been applying its buffer zone policy in considering requests for zoning changes though not with absolute consistency. The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner. While more detailed factual findings concerning these zoning changes would have been helpful, an examination of the record and exhibits indicates that the district court's finding that defendants were concerned with "the integrity of the Village's zoning plan" is not clearly erroneous.

II.

Plaintiffs also argue that even if the buffer zone policy has been properly applied the refusal to rezone the land has a racially discriminatory effect, and perpetuates Arlington Heights' segregated character. Regardless of the Village Board's motivation, if this alleged discriminatory effect exists, the decision violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1963).

[2] The real question is whether there is a racially discriminatory effect for equal protection purposes. It is true that a

greater percentage of blacks than whites are affected by the Village's decision since a greater percentage of blacks than of whites are in the low and middle income categories that are eligible for this proposed section 236 housing development. (Blacks comprise forty percent of the eligible prospective tenants.) But this disparity does not necessarily mean that the zoning change refusal had the type of racially discriminatory effect that requires the invocation of the compelling state interest tests. As indicated, the "class" that is affected by the Village's action is composed of individuals with low and moderate incomes. Racial minorities constitute a higher percentage of this class than they do percentagewise of the population in general within the Chicago metropolitan area. This fact alone, however, does not make decisions that affect those in the lower income bracket more than others racially discriminatory governmental actions. English v. Town of Huntington, 448 F.2d 319, 324 (2d Cir. 1971). Governmental action having a disproportionate impact on a class composed of an extremely high percentage of racial minorities might be classified as discriminatory in an equal protection sense. But that is not this case. Indeed, this narrow question has, we think, impliedly been answered by the Supreme Court in James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971). *James* was concerned with a provision of the California Constitution that required state developed low-rent housing projects to be approved only upon a referendum vote. The briefs presented to the Court showed that at least some of the defeated housing proposals were in areas with a disproportionately high minority population and that racial minorities would have benefited more from the low income housing. Yet, the Supreme Court explicitly rejected the contention that the provision created a racial distinction that is subject to strictest scrutiny:

> The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. 402 U.S. at 141, 91 S.Ct. at 1333.

Accordingly, *James* supports our analysis that racial disparity alone as it relates to the housing project under consideration does not amount to racial discrimination.

III.

[3] It is argued on behalf of plaintiffs that in the type of situation before us an analysis of racial discrimination must, however, extend further. *See* United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974). The impact of the Village's refusal to rezone "must be assessed not only in its immediate objective but its historical context and ultimate effect." Kennedy Park Homes Association v. City of Lackawanna, New York, 436 F.2d 108, 112 (2d Cir. 1970).

The instant case reflects the unfortunate fact that historically the Chicago metropolitan area has been segregated in terms of housing. As we recently said in Clark v. Universal Builders, Inc., 501 F.2d 324, 334-35 (7th Cir. 1974), "Nor do we think it beyond the strictures of judicial notice to observe that there exists in Chicago and its environs a high degree of racial residential segregation." More specifically, the population of Arlington Heights in 1970 was 68,884, but only twenty-seven residents were black.[1] The four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black.[2] Indeed, the percentage of blacks in this area

1. According to statistics of plaintiffs' expert, demographer and urbanologist Pierre de Vise, Arlington Heights is the most residentially segregated community in the Chicago metropolitan area among municipalities with more than fifty thousand residents.

2. The impact of this statistic can be fully appreciated only in the context of the shift in employment opportunities during that same period. While the City of Chicago lost 230,000 jobs, the number of jobs in the four-township Arlington Heights area rose

(Footnote continued on next page)

actually decreased over this ten-year span while the percentage of the population in the entire Chicago metropolitan area that was black increased from fourteen percent to eighteen percent.

The ultimate effect of the Village's decision is, in all probability, that no section 236 housing will be built in Arlington Heights since plaintiffs were unable to find an economically feasible and suitable alternative site. Consequently a development for which blacks represent forty percent of the eligible applicants will not be built. Parenthetically, it must be noted that based solely on the cost of presently available housing of all types in the Chicago area, blacks would occuply five percent of the housing in Arlington Heights. We have no doubt that if Lincoln Green were built, it, unlike the rest of the Village, would be an integrated community. Though the building of this project might have only minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population by over one thousand percent. What is even more crucial is that this suburb has not sponsored nor participated in any low income housing developments, nor does the record reflect any such plans for the future. Realistically, Lincoln Green appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of defacto segregated housing. Thus the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem.

(Footnote continued from preceding page.)
from 100,000 to 200,000. Blacks, however, have not been able to take full advantage of these job opportunities. In 1970 only 137 of the 13,000 people who worked in Arlington Heights were black. Part of the explanation for this is that many black workers have been unable to find housing they can afford in Arlington Heights. A study issued by the Cook County Office of Economic Opportunity indicated that based on its survey almost all the black workers in Arlington Heights resided in Chicago. Moreover, the report stated that one of the main problems Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants.

[4] The defendants' anwser is that even if the refusal to rezone does have this effect it cannot be deemed a "discriminatory" effect. Since no direct action attributable to Arlington Heights created the segregated housing pattern, the municipality argues that it has no affirmative duty to alleviate the problem. We do not agree.

Merely because Arlington Heights did not directly create the problem does not necessarily mean that it can ignore it. In Clark v. Universal Builders, Inc., 501 F. 2d 324 (7th Cir. 1974), we, in effect, required that a builder forego "market prices" for homes built in black areas because the inflated "market prices" were a result of the segregated housing situation that could not simply be ignored. The builder could not "exploit" the situation even though he was in no way responsible for the discrimination that created the problem. To do so was itself an act of discrimination prohibited by 42 U.S.C. § 1982.

[5] In the instant case Arlington Heights has been ignoring what is essentially the same basic problem. Indeed, it has been exploiting the problem by allowing itself to become an almost one hundred percent white community. The Lincoln Green proposal represents an opportunity to help reverse this trend both in the entire Chicago area and more dramatically in the composition of the Village itself. Yet defendants argue that the Village need not consider such factors and that we should ignore them in determining whether there is a discriminatory effect in this case. But we cannot ignore segregation. This much is evident from Clark in terms of section 1982 and the Thirteenth Amendment and we think the principle is applicable to the Fourteenth Amendment in this case. *Cf.* United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach Florida, 493 F.2d 799, 810-811 (5th Cir. 1974). Because the Village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segre-

gated housing. We therefore hold that under the facts of this case Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects. It could be upheld only if it were shown that a compelling public interest necessitated the decision.

IV.

The argued justifications for the decision are based on two grounds: maintaining integrity of the zoning plan (buffer policy) and protecting neighboring property values. Neither of these can be deemed "compelling."

As we have already indicated, the Village has not even been consistent in applying its zoning plan when considering requests for zoning changes to R-5. Moreover, even if a municipality's desire to limit multifamily dwellings to instances in which they might serve as a transitional buffer zone could ever be a compelling interest, it is certainly not in this case. Lincoln Green will not be a highrise development, but merely a cluster of two-story townhouses no higher than the surrounding single family homes. As noted by two dissenting members of the Arlington Heights Plan Commission, in terms of density, architecture and most other characteristics, such townhouses are more similar to R-3 dwellings than R-5 buildings. The planning rationale behind the buffer zone policy has only minimal applicability to this type of lowrise, open-space development. It is not a sufficiently compelling interest to justify the racially discriminatory effect.

Nor do we find that the decision can be supported by the fact that neighboring property values might be diminished by as much as five to ten percent as asserted by defendants' witness. It is questionable whether this purely private monetary consideration could be a compelling interest. In this instance it is not. The explanation for this diminution in value is that the single family property owners had relied on the integrity of the Comprehensive Plan and Lincoln Green would be a variance from the

expected totally single family neighborhood. Not only have there been other variances in Arlington Heights, but the neighboring residents certainly could not expect that the zoning plan would always be adhered to even when a racially discriminatory effect would be the result.

Since no compelling justification for the decision exists, the refusal to grant the requested zoning change is a violation of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the district court is reversed and this cause is remanded for entry of judgment in accordance with this opinion.

FAIRCHILD, Chief Judge (dissenting).

I agree that the district court's finding that defendants' refusal to grant plaintiffs a zoning variance was motivated by valid planning considerations is not clearly erroneous. I also agree that, if plaintiffs establish that the Village's enforcement of its zoning scheme makes construction of housing for low and moderate income individuals not reasonably possible, the refusal perpetuates racial segregation and, absent compelling govenmental justification, the plaintiffs would be entitled to the relief they seek. United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1186 (8th Cir. 1974).

The majority states "[t]he ultimate effect of the Village's decision is, in all probability, that no section 236 housing will be built in Arlington Heights since plaintiffs were unable to find an economically feasible and suitable alternative site." I cannot agree that the record supports such a conclusion. The district court found that the Village "[has] zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff." I cannot say that this finding was clearly erroneous. A review of the record reveals that at the time of the Village's decision to deny the variance, there were at least nine undeveloped tracts of land in excess of fifteen acres zoned R-5 (multi-family hous-

ing). The record does not contain a sufficient showing by plaintiffs that it was not reasonably possible to construct the proposed project on one of these sites.

Accordingly, I would affirm the district court's judgment in favor of defendants.

APPENDIX D.

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373 F. Supp. 208.

No. 72 C 1453.

UNITED STATES DISTRICT COURT, N. D. Illinois.

Feb. 22, 1974.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, an Illinois not-for-profit corporation, et al.,

Plaintiffs,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, et al.,

Defendants,

and

NORTHWEST OPPORTUNITY CENTER, INC., an Illinois not-for-profit corporation, et al.,

Plaintiffs-Intervenors.

DECISION.

McMILLEN, District Judge.

This case came on for trial on the merits, and the court has heard the evidence and considered the exhibits offered and received. The court has also considered the pre-trial stipulation and post-trial briefs filed by the parties and is fully advised in the premises. We find and conclude that judgment should be entered in behalf of all defendants, for the reasons stated hereinafter pursuant to F. R. C. P. 52(a).

Plaintiffs consist of a not-for-profit corporation created to develop housing for low and moderate income tenants and three individuals who seek to represent a class of such persons. The plaintiff corporation owns an option to purchase 15 acres

Plaintiffs contend that their civil rights have been violated by virtue of a decision of the trustees of the Village of Arlington Heights, Illinois, not to rezone the land in question for multiple family housing. Specifically, they allege in Count I that defendants have perpetuated racial segregation by declining to rezone and, in Count II, that the plaintiff corporation has been denied the right to use its property in a reasonable manner. This allegedly constitutes a violation of the plaintiffs' civil rights under Sec. 1981, 1982 or 1983 of the Civil Rights Act and the Fair Housing Act of 1968. 42 U. S. C. §§ 1981, 1982 and 1983, and § 3601 et seq. respectively. No specific section of the Fair Housing Act is referred to in the pleadings and none seem applicable to the facts of this case.

Plaintiffs seek in the case at bar to extend the penumbra of the Fourteenth Amendment considerably beyond its present outer limits. They do not represent persons seeking to eliminate discrimination in existing facilities, whether residential or some other type. They do not represent a landowner seeking to use his property for some purpose within the existing zoning ordinances. Rather, the corporate plaintiff seeks to require defendants to rezone a vacant tract of land so that it can build a Federally subsidized low rent project on it, for occupancy by the class which the individual plaintiffs seek to represent. The justification proposed for using judicial processes to achieve rezoning is to supply housing for low income tenants who desire to work and live in the area. No cases have been cited by plaintiffs to support this extension of the Fourteenth Amendment into area-wide integration, but they rely primarily on familiar cases involving education, employment or public facilities. They also rely on Kennedy Park Homes Ass'n et al. v. City of Lackawanna, N. Y. et al., 436 F. 2d 108 (2nd Cir. 1970), cert.

den. 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546, where defendants acquired a tract for discriminatory reasons and were ordered to restore its prior status. We do not find that these authorities support the plaintiffs' objectives in the case at bar, notwithstanding their laudatory motives.

The litigability of this and other legal issues have been decided by our predecessor judge on appropriate motions, and we find no need to reexamine his conclusions. We assume for the purposes of this Decision that the plaintiff corporation has sufficient interest in this property to give it standing to sue. The essence of the alleged offense is the refusal of the Village to accommodate a landowner's desire to use his property as he sees fit, although the plaintiff corporation acquires no different status than any other corporation merely because it has been created for the purpose of developing housing for low income tenants.

[1] The individual plaintiffs, in our opinion, do not represent a definable or manageable class. They purport to represent "low and moderate income minority-group members who work or desire to work in Arlington Heights but cannot find decent housing in Arlington Heights at rents they can afford". Obviously the members of this class would be too heterogeneous and varied to ever be brought into court, and their claims would raise a multitude of different factual questions. Nevertheless, one individual plaintiff, Electeria Muldonado, a Mexican-American, did appear and testify, and her presence along with the corporate plaintiff suffices to raise a case or controversy concerning the validity of the defendants' acts. Since we intend to decide this issue on its merits, we see no purpose to be served by debating the question of standing any further.

Defendants are accused of failing and refusing to rezone the 15 acre tract from an R-3 single-family detached residence use to an R-5 multi-family attached residence use (such as apartments). Plaintiffs took the necessary administrative steps to obtain rezoning and made various changes in its proposal in an

attempt to satisfy various objections which were raised by the Village's Plan Commission. Ultimately, however, the Plan Commission recommended against rezoning the property and the defendant trustees voted 6 to 1 against the proposition on September 28, 1971. Plaintiffs allege that this vote was motivated at least in part by racial discrimination against certain minority groups who work in or around Arlington Heights.

There is no direct evidence by which to determine the motives or mental processes of the trustees, and plaintiffs depend on circumstantial evidence. The crucial fact question, however, is whether the result of the defendant trustees' action caused racial discrimination. As has often been stated, (*e.g.*, Gautreaux et al. v. Romney, 448 F. 2d 731 at 738 (7th Cir. 1971), motives are irrelevant if the effect is illegal. If it is, we would reach the legal question of whether defendants can be required to change the zoning of the property.

Plaintiffs have failed to carry their burden of proving discrimination by defendants against racial minorities as distinguished from the under-privileged generally. They have proved that housing for low-earners is scarce in Arlington Heights and the surrounding suburban area, but this affects the entire group, not merely blacks or Mexican-Americans. The Fourteenth Amendment and the Civil Rights Act prohibit discrimination against blacks and certain other minorities but does not afford rights to poor people as such. Furthermore, some blacks and other minorities do live in Arlington Heights, and an 11% vacancy rate exists for rental property in the Village. What is lacking is low rent property, but even this is available at the corporate plaintiff's project just north of Arlington Heights and nearer to the principal employer of minorities than is the property on which the plaintiff now seeks to build new housing.

There are many reasons why members of minority groups would not necessarily move into the defendant village, besides alleged discriminatory violations. This is illustrated by one of the two blacks who testified as a plaintiff. After his employer

had moved its plant to Arlington Heights, he voluntarily moved farther away and thereby increased his commuting time from 35 minutes to one hour. His motive was to invest in a two-flat, not to live in a suburb near his employment.

[2] There can be no question but that plaintiffs and the group which they seek to represent would be benefited by this proposal. It is not denied by the defendants that citizens with low incomes would find better living conditions in the project and might be able to save expenses by living there. However, plaintiffs do not contend that their jobs are in jeopardy for want of a convenient and economical place to live, and their employers do not contend that they are deprived of an adequate supply of labor in the low-wage brackets. In fact, the employers are not parties hereto and no evidence was presented on their posture in this controversy. The legal issue on this point, therefore, is whether low-income minorities have a constitutional right to live in an area where they work or desire to seek work. Even more broadly, do low-income workers have a constitutional right to low-rental housing either where they work or elsewhere? We know of no such rule of law.

Plaintiffs did prove that the "highest and best use" of this property from an economic standpoint is for multi-family dwellings. High rise apartments such as have been built elsewhere on R-5 property in Arlington Heights are even more economically desirabie for the landowner than the low-income project proposed by the plaintiff corporation. However, the issue in this case is whether defendants can be required to zone any real estate for multi-family dwelling if they have good faith reasons for not doing so.

Defendants' evidence shows that the property in question was originally zoned for single-family detached residences and has been continuously so zoned up to the present time. It has always been vacant and is completely surrounded by single-family residences, with the exception of a parochial school on the north and the religious order's three-story dormitory on the west, a

pre-existing non-conforming use. The village's zoning plan contemplates the systematic development of land for particular uses with buffer zones or devices between different use zones. In the case at bar, the plaintiffs' project would not constitute a buffer between zones, because no other zone except R-3 exists in the area.

[3] On the other hand, the evidence shows that a multi-family development would seriously damage the value of the surrounding single-family homes and that its presence in the area is strongly opposed by large groups of citizens of the village. Their motive may well be opposition to minority or low-income groups, at least in part, but the circumstantial evidence does not warrant the conclusion that this motivated the defendants. They have zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff—as no doubt are some existing multi-family buildings. The weight of the evidence proves that the defendants were motivated with respect to the property in question by a legitimate desire to protect property values and the integrity of the Village's zoning plan. This is not an arbitrary or capricious act in derogation of the plaintiffs' 14th Amendment rights.

Lest plaintiffs conclude that they are faced with an insurmountable problem of proof, they are referred to a recent decision by this court in the case of Cousins et al. v. City Council of the City of Chicago et al., D. C., 361 F. Supp. 530. There the plaintiffs succeeded in proving that the defendant City discriminated against a black minority when it established the boundaries of the 7th Ward, as evidenced by certain acts and statements of an alderman, changes wrought in a pre-existing ward map, and certain circumstantial evidence. This decision, incidentally, is on appeal.

Another possible deficiency with plaintiffs' case is that the corporation lacks the present capacity to carry out its proposed project. It was to be financed pursuant to Sec. 236 of the National Housing Act of 1968. However, according to the evi-

dence, all funds under this statute have been sequestered and no projects are now being financed. The plaintiff's option with the owners would terminate if a Sec. 236 project could not be built on the property, but the present Federal funding situation would at least cause this Court to withhold any present relief to the plaintiffs. The sequestration of funds may continue permanently or may change, but once the land is zoned R-5, the process is well-nigh irreversible, and many varieties of buildings could then be constructed by the legal owners in the midst of the existing single-family residential area.

This leads to the question of whether the legal owner of the property has a Federal right to require zoning for the highest and best use. Aside from the statutes cited above (p. 209), no Federal rights are relied upon by the plaintiffs, and these statutes do not reach zoning *per se*. This particular issue was not decided on the motion to dismiss the complaint in Sisters of Prov. of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (D. C. 1971).

Also lurking in the background is what conditions a municipal corporation can legitimately require before property is rezoned. Except for the issue of discrimination raised in Count I and the issue of arbitrary and capricious denial of the corporation to use its own property in a reasonable manner raised in Count II, however, the validity of local zoning procedures have not been contested by the plaintiffs and are properly reserved for the state courts.

It is therefore ordered, adjudged and decreed that judgment is entered on the Complaint and on the Intervening Complaint in favor of the defendants.

APPENDIX E.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 25, 1977.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

METROPOLITAN HOUSING DEVELOPMENT CORP., et al.,
Plaintiffs-Appellants,

No. 74-1326 *vs.*

VILLAGE OF ARLINGTON HEIGHTS, et al.,
Defendants-Appellees,

NORTHWEST OPPORTUNITY CENTER and ELUTERIA D. MALDONADO,
Intervening Plaintiffs-Appellants.

On Petition for Rehearing *En Banc.*

Because a majority of the active members of the court did not vote to grant a rehearing *en banc* of this matter, the suggestion that this appeal be reheard *en banc* is DENIED.

The Petition for rehearing is DENIED.

Judges Pell, Tone, Bauer and Wood voted to grant a rehearing *en banc.*

APPENDIX F.

Amendment XIV, Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1968 FAIR HOUSING ACT, 42 U. S. C. §§ 3601-3619.

§ 3601. Policy.—It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. (Apr. 11, 1968, PL 90-284, Title VII, § 801, 82 Stat. 81)

§ 3602. Definitions.—As used in this title [§§3601-3619 of this title]—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representa-

tives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, or 806 [§§ 3604, 3605, or 3606 of this title].

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States. (Apr. 11, 1968, PL 90-284, Title VII, § 802, 82 Stat. 81)

§ 3603. Effective dates of certain prohibitions.—(a) Subject to the provisions of subsection (b) and section 807 [§ 3607 of this title], the prohibitions against discrimination in the sale or rental of housing set forth in section 804 [§ 3604 of this title] shall apply.

(1) Upon enactment of this title [§§ 3601-3619 of this title], to—

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to the date of enactment of this title [April 11, 1968];

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to the date of enactment of this title [April 11, 1968]: Provided, That nothing contained in subparagraphs (B) and (C) of this

subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b).

(b) Nothing in section 804 [§ 3604 of this title] (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be accepted from the application of this title [§§ 3601-3619 of this title] only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman,

or of such facilities or services of any person in the business of selling or renting dwellings, or any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 804(c) of this title [§ 3604(c) of this title]; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(c) For the purposes of subsection (b), a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families. (Apr. 11, 1968, PL 90-284, Title VIII, § 803, 82 Stat. 82.)

§ 3604. Discrimination in the sale or rental of housing.—As made applicable by section 803 [§ 3603 and this title] and execpt as exempted by sections 803(b) and 807 [§§ 3603(b), 3607 of this title], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negoiate for the sale or rental of, or

otherwise make unavailable or deny, dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 804, 82 Stat. 83.)

§ 3605. Discrimination in the financing of housing.—After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such

loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 803(b) [§ 3603(b) of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 805, 82 Stat 83.)

§ 3606. Discrimination in the provision of brokerage services.—After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 806, 82 Stat 84.)

§ 3607. Exemption.—Nothing in this title [§§ 3601-3619 of this title] shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this title [§§ 3601-3619 of this title] prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members. (Apr. 11, 1968, PL 90-284, Title VII, § 807, 82 Stat. 84.)

§ 3608. Administration.—(a) The authority and responsibility for administering this Act [18 §§ 231 and note-233, 241, 242, 245 and note, 1153, 2101, 2102; 25 §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 1360 note; §§ 1973j, 3601-3619, 3631 of this title] shall be in the Secretary of Housing and Urban Development.

(c) [b] The Secretary may delegate any of his functions, duties and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this title [§§ 3601-3619 of this title]. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344, 5362, and 7521 of title 5 of the United States Code. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(d) [c] All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title [§§ 3601-3619 of this title] and shall cooperate with the Secretary to further such purposes.

(e) [d] The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title [§§ 3601-3619 of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 808(a), (c)-(e), 82 Stat. 84.)

Explanatory note.—The bracketed subsection designations "b", "c", and "d" are inserted in view of the omission of subsec (b) of § 808 of Act Apr. 11, 1968, cited to text. Such subsec (b) amended §§ 3533 and 3535 of this title and is reflected therein.

§ 3609. Education and conciliation.—Immediately after the enactment of this title [April 11, 1968] the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this title [§§ 3601-3619 of this title]. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this title [§§ 3601-3619 of this title] and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and transportation expenses for persons attending such conferences as provided in section 5703 of title 5 of the United States Code. He shall consult with State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such

discrimination in connection with or in place of, the Secretary's enforcement of this title [§§ 3601-3619 of this title]. The Secretary shall issue reports on such conferences and consultations as he deems appropriate. (Apr. 11, 1968, PL 90-284, Title VIII § 809, 82 Stat 85.)

§ 3610. Enforcement.—(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this title [§§ 3601-3619 of this title] without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) A complaint under subsection (a) shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discrimina-

tory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answer shall be verified.

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title [§§ 3601-3619 of this title], the Secretary shall notify the appropriate State or local agency of any complaint filed under this title [§§ 3601-3619 of this title] which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title [§§ 3601-3619 of this title], the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title [§§ 3601-3619 of this title], insofar as such rights relate to the subject of the complaint: Provided, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing

law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title [§§ 3601-3619 of this title]. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 812 [§ 3612 of the title], enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

(f) Whenever an action filed by an individual, in eight Federal or State court, pursuant to this section or section 812 [§ 3612 of this title], shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance. (Apr. 11, 1968, PL 90-284, Title VIII, § 810, 82 Stat. 85.)

§ 3611. Investigations—Subpenas—Giving of evidence.—(a) In conducting an investigation the Secretary shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: Provided, however, That the Secretary first complies with the provisions of the Fourth Amendment relating to unreasonable searches and seizures. The Secretary may issue subpenas to compel his access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpenas or interrogatories were

issued or served in aid of a civil action in the United States district court for the district in which the investigation is taking place. The Secretary may administer oaths.

(b) Upon written application to the Secretary, a respondent shall be entitled to the issuance of a reasonable number of subpenas by and in the name of the Secretary to the same extent and subject to the same limitations as subpenas issued by the Secretary himself. Subpenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

(c) Witnesses summoned by subpena of the Secretary shall be entitled to the same witness and mileage fees as are witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpena issued at the request of a respondent shall be paid by him.

(d) Within five days after service of a subpena upon any person, such person may petition the Secretary to revoke or modify the subpena. The Secretary shall grant the petition if he finds that the subpena requires appearance or attendance at an unreasonable time or place, that it requires production of evidence which does not relate to any matter under investigation, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

(e) In case of contumacy or refusal to obey a subpena, the Secretary or other person at whose request it was issued may petition for its enforcement in the United States district court for the district in which the person to whom the subpena was addressed resides, was served, or transacts business.

(f) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if in his power to do so, in obedience to the subpena or lawful order of the Secretary, shall

be fined not more than $1,000 or imprisoned not more than one year, or both. Any person who, with intent thereby to mislead the Secretary, shall make or cause to be made any false entry or statement of fact in any report, account, record, or other document submitted to the Secretary pursuant to his subpena or other order, or shall willfully neglect or fail to make or cause to be made, full, true, and correct entries in such reports, accounts, records, or other documents, or shall willfully mutilate, alter, or by any other means falsify any documentary evidence, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(g) The Attorney General shall conduct all litigation in which the Secretary participates as a party or as amicus pursuant to this Act [18 §§ 231 and note-233, 241, 242, 245 and note, 1153, 2101, 2102; 25 §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 1360 note; §§ 1973j, 3601-3619, 3631 of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 811, 82 Stat. 87).

§ 3612. Enforcement by private persons.—(a) The rights granted by sections 803, 804, 805, and 806 [§§ 3603-3606 of this title] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be comenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: Provided, however, That the court shall continue such civil case brought pursuant to this section or section 810(d) [§ 3610(d) of this title] from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: And provided, however, That any sale,

encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act [18 §§ 231 and note-233, 241, 242, 245 and note, 1153, 2101, 2102; 25 §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 1360 note; §§ 1973j, 3601-3619, 3631 of this title], and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act [18 §§ 231 and note-233, 241, 242, 245 and note, 1153, 2101, 2102; 25 §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 1360 note; §§ 1973j; 3601-3619, 3631 of this title] shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorneys fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees. (Apr. 11, 1968, PL 90-284, Title VIII, § 812, 82 Stat. 88.)

§ 3613. Enforcement by the Attorney General.—(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full employment of any of the rights granted by this title [§§ 3601-3619 of this title], or that any group of persons has been denied any of the rights granted by

this title [§§ 3601-3619 of this title] and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title [§§ 3601-3619 of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 813, 82 Stat. 88.)

Explanatory note.—This section, as enacted, was designated subsec (a); however § 813 of Act Apr. 11, 1968, cited to text, consisted of only one paragraph.

§ 3614. Expedition of proceedings.—Any court in which a proceeding is instituted under section 812 or 813 of this title [§ 3612 or 3613 of this title] shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited. (Apr. 11, 1968, PL 90-284, Title VIII, § 814, 82 Stat. 88)

§ 3615. Effect on State laws.—Nothing in this title [§§ 3601-3619 of this title] shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title [§§ 3601-3619 of this title] shall be effective, that grants, guarantees or protects the same rights as are granted by this title [§§ 3601-3619 of this title]; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title [§§ 3601-3619 of this title] shall to that extent be invalid. (Apr. 11, 1968, PL 90-284, Title VIII, § 815, 82 Stat. 89)

§ 3616. Cooperation with State and local agencies administering fair housing laws.—The Secretary may cooperate with State and local agencies charged with the administration of

State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this title [§§ 3601-3619 of this title]. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register. (Apr. 11, 1968, PL 90-284, Title VIII, § 816, 82 Stat. 89)

§ 3617. Interference, coercion, or intimidation.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment or, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806 [§§ 3603, 3604, 3605, or 3606 of this title]. This section may be enforced by appropriate civil action. (Apr. 11, 1968, PL 90-284, Title VIII, § 817, 82 Stat. 89)

§ 3618. Appropriations.—There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this title [§§ 3601-3619 of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 818, 82 Stat. 89)

§ 3619. Separability of provisions.—If any provision of this title [§§ 3601-3619 of this title] or the application thereof to any person or circumstances is held invalid, the remainder of the title and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby. (Apr. 11, 1968, PL 90-284, Title VIII, § 819, 82 Stat. 89)